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91-1154

No.

Supreme Court, U.S.
FILED
JAN 15 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

STANDARD FRUIT COMPANY,
STANDARD FRUIT AND STEAMSHIP COMPANY,
and CASTLE & COOKE, INC.

Petitioners,

v.

REPUBLIC OF NICARAGUA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether an appellate court may review *de novo* a district courts' factual findings, made pursuant to the Federal Arbitration Act, 9 U.S.C. § 4, that the signatories to a Memorandum of Intent did not enter into a binding arbitration agreement.

2. Whether *Prima Paint v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967) requires a trier of fact, in determining whether ambiguous language in a Memorandum of Intent created a binding arbitration agreement, to sever the arbitration language from its context and reject consideration of surrounding terms, the nature of the document, and other extrinsic evidence of the parties' intent.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Standard Fruit Company ("Standard Fruit"), Standard Fruit and Steamship Company ("Steamship"), and Castle & Cooke, Incorporated ("Castle & Cooke") respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered on July 1, 1991. The Ninth Circuit panel's determination of a matter of federal arbitration law violated settled federal procedure, created a circuit split, and distorted this Court's precedent in *Prima Paint v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967).

OPINIONS BELOW

The Memorandum Opinion of Judge John P. Vukasin, Jr., of the United States District Court for the Northern District of California, was issued on April 14, 1988 after a three-day evidentiary hearing, and is reprinted in the Appendix at 27a.

The opinion of the Ninth Circuit panel is reported at 937 F.2d 469 (9th Cir. 1991) and is reprinted in the Appendix at 1a.

JURISDICTION

This action was brought by the Republic of Nicaragua ("Nicaragua") against Standard Fruit, Steamship, and Castle & Cooke. Jurisdiction in the district court was proper under 28 U.S.C. §§ 1332(a)(4) and 1603(a) in that the matter in controversy exceeded $50,000 and was between a foreign state as Plaintiff and citizens of California or different states as Defendants. Nicaragua's amended complaint sought arbitration pursuant to the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*

After a three-day evidentiary hearing, the district court filed its Findings of Fact and Conclusions of Law on April 14, 1988. Sitting as the trier of fact on the arbitration issue, it denied Nicaragua's motion to compel arbitration and dismissed Count I of the complaint. The district court also granted summary judgment on Count II of the amended complaint alleging breach of contract. Nicaragua sought appeal of the arbitration decision in the Ninth Circuit under 28 U.S.C. § 1292(a)(1) and 9 U.S.C. § 15(a)(1). Nicaragua also appealed the district court's award of summary judgment on its breach of contract claim pursuant to

the district court's certification under 28 U.S.C. § 1292(b) and the Ninth Circuit's order filed June 14, 1989.

The Ninth Circuit panel filed its opinion on July 1, 1991. The Petition for Rehearing was denied on October 17, 1991. This Petition is filed within 90 days of the denial of rehearing as allowed under 28 U.S.C. § 2101(c) and Supreme Court Rule 13.1.

The jurisdiction of this Court to review the Ninth Circuit judgment is invoked under 28 U.S.C. § 1254(1).

TEXT OF STATUTES AND RULES

9 U.S.C. § 4 provides in pertinent part:

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. . . . The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. . . . If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the

> party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

Fed. R. Civ. P. 52(a) provides in pertinent part:

> In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; . . . Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. . . . .

STATEMENT OF THE CASE

District Court Proceedings and Factual Findings

Nicaragua filed suit against Petitioners[1] on October 21, 1986, alleging, *inter alia*, breach of a five-year contract for the purchase of bananas that allegedly arose out of a Memorandum of Intent (App. at 49a) signed by high-ranking Nicaraguan Government officials and officers of Castle and Cooke and Steamship in 1981.[2] Nicaragua subsequently amended its com-

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[1] Standard Fruit is a production company which enters into contracts with fruit growers overseas, and engages in agricultural development and other activities for fruit production and exportation. Pursuant to Supreme Court Rule 29.1, Petitioners provide the following corporate information. *Castle & Cooke, Inc.* changed its name to Dole Food Company in 1991. Dole Food Company owns Castle & Cooke Fresh Fruit Company, which in turn owns: (1) *Standard Fruit & Steamship Company;* and (2) Dole Fresh Fruit Company, which in turn owns *Standard Fruit Company.* Dole Food Company (formerly *Castle & Cooke, Inc.*) has no parent company. Its non-wholly owned subsidiaries are: Thai-American Products; T.A.I.C., Ltd.; Dole Thailand Limited; Compania Exportadora de Productos Agricolas Vana, Ltda.; and House of Investments, Inc. The parent company of *Standard Fruit & Steamship Company* is Castle & Cooke Fresh Fruit Company. Standard Fruit & Steamship has no non-wholly owned subsidiaries. The parent company of *Standard Fruit Company* is Dole Fresh Fruit Company. Standard Fruit's non-wholly owned subsidiaries are: Cerveceria Hondurena, S.A.; Fabrica de Mantaca y Jabon Atlantida, S.A.; Manufacturas de Carton, S.A.; and Standard Fruit Company de Costa Rica.

[2] Standard Fruit actively participated in the negotiations, but did not sign the Memorandum of Intent. The district court, after hearing *inter alia* the testimony of the Head of Standard Fruit's Nicaragua Division, considered this fact of "great significance" because Standard Fruit "had been the purchaser of bananas and would be transferring its shares, selling its assets, providing

plaint to add a demand for arbitration. Petitioners moved to dismiss the breach of contract and arbitration claims, and Nicaragua then filed a motion to compel arbitration.

On January 21, 1987, the district court (Hon. John P. Vukasin, Jr.) heard Nicaragua's motion and concluded that the alleged making of an arbitration agreement was "in issue," and set the matter for an evidentiary hearing pursuant to 9 U.S.C. § 4. At Nicaragua's request, the court permitted full discovery with respect to: (1) whether the Memorandum of Intent was intended by the parties to be a binding contract; (2) if so, whether the language within the Memorandum of Intent concerning dispute resolution was intended to evidence a present agreement to arbitrate; and (3) if it was, whether the disputes before the court were of the type contemplated to fall within the scope of the agreement to arbitrate.

The district court heard three days of testimony, including five witnesses who signed the Memorandum of Intent, and received 92 exhibits and excerpts from depositions of 10 additional witnesses. On April 14, 1988, the district court entered its Findings of Fact and Conclusions of Law, in which it found *as a matter*

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technical assistance, and buying and selling bananas under the contemplated new structure, [but] was not a signatory. This can only lead to the conclusion that the Memorandum of Intent was not a purchase agreement or a contract to purchase but was a statement of 'political willingness to have Standard Fruit come back to Nicaragua' and a statement that would lay the broad ground rules for the anticipated contract between the Republic of Nicaragua and the eventual purchaser of bananas." Findings of Fact ¶ 60. The panel held that this fact was irrelevant. 937 F.2d at 479.

of fact that the Memorandum of Intent was not intended to be, and was not, a contract, and in any event did not incorporate a present agreement to arbitrate disputes. The court therefore denied Nicaragua's motion to compel arbitration.[3]

The district court's findings detailed Petitioners' pre-Sandinista business arrangements in Nicaragua, which the 1979 overthrow of the Government arrested. The ruling Junta indicated its intent to assume greater control over the production and marketing of bananas. On December 20, 1980, the Junta promulgated Decree No. 608, declaring that the banana industry would thenceforth operate solely as a state enterprise, that all land leases would be transferred to the new state enterprise, and that all pre-existing lease, partnership, and fruit purchase contracts were nullified. Standard Fruit construed Decree No. 608 as an expropriation of its banana business, and decided to cease operations in Nicaragua.[4]

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[3] After determining that Nicaragua's claims were not arbitrable, the district court then proceeded to rule on the merits of Petitioners' motions to dismiss the breach of contract claim, which had been converted into motions for summary judgment. The court granted summary judgment in favor of defendants, holding that: (1) Nicaragua had failed to establish any genuine issue of material fact as to whether any signatory to the Memorandum of Intent was acting or reasonably appeared to be acting as an agent for Standard Fruit Company, and therefore granted summary judgment as to Standard Fruit on the breach of contract count; and (2) the Memorandum of Intent, even if considered a binding contract, *as a matter of law* did not constitute a contract for the purchase and sale of bananas over a five-year period. The Ninth Circuit vacated these holdings and remanded with instructions to refer the breach of contract issues to arbitration.

[4] In late 1980, Standard Fruit was the *only* enterprise pro-

The parties met, at the Sandinistas' request, to discuss whether there was any basis for resumption of banana operations in Nicaragua. After three days of meetings, on January 11, 1981, Nicaragua, Castle & Cooke, and Steamship (but not Standard Fruit) executed a document entitled "Memorandum of Intent." App. at 49a. The Memorandum embodied preliminary terms of agreement for Standard Fruit to return to Nicaragua, pursuant to the following contracts that the parties would subsequently negotiate: (1) a purchase of Standard Fruit's shares in the banana production societies "under mutually agreeable conditions" and of Standard Fruit's assets at a price to be determined; (2) a fruit purchase contract; and (3) a technical assistance contract. In essence, Nicaragua was to acquire Standard Fruit's business over a five-year period, during which Standard Fruit would resume purchasing fruit and providing technical help.

The Nicaraguan officials themselves stressed the preliminary nature of the Memorandum, and insisted on certain changes in the Memorandum to reflect its preliminary nature. For example, the Nicaraguans insisted upon changing the preamble language from "the parties hereby agree," to "the parties hereby agree in principle." The Nicaraguans further insisted on dilution of the arbitration language in Paragraph IV; language originally providing that any disputes "arising under the arrangements contemplated hereunder" "will be referred to arbitration in London, England, according to the rules of the London Arbitration Association" was changed to read as follows (as qualified by the preamble phrase "in principle"):

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ducing and marketing bananas in Nicaragua. Standard Fruit thus properly perceived that it was the target of Decree No. 608.

> [a]ny and all disputes *arising under the arrangements contemplated hereunder*, should same not be able to be settled amicably settled [*sic*] by the parties, will be referred to mutually agreed mechanisms *or* procedures of international arbitration, such as the rules of the London Arbitration Association.

(Emphasis added.) Robert Moore, Esq., the General Counsel of Castle & Cooke and the principal draftsman of the Memorandum, testified that Paragraph IV expressed the parties' intent that the subsequent contracts discussed in the Memorandum (i.e., the contracts for acquisition of assets; purchase and sale of fruit; and technical assistance), once finalized, would include provisions for arbitration.[5] Nicaragua's witnesses also testified that the parties expected the contemplated contracts to include arbitration clauses, and in fact, all of Nicaragua's contract drafts contained such arbitration provisions.

The parties understood that many obstacles remained before an actual contractual arrangement could emerge. For example, Standard Fruit would have to obtain the consent of the landowners who were its partners in the banana production societies

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[5] Judge Vukasin denied the motion to compel arbitration in part because "the testimony of defendants' witnesses that the Memorandum was not intended as a binding contract is credible and consistent with the document's language, surrounding circumstances, and the parties' contemporaneous conduct," while the testimony of plaintiff's witnesses was "less credible and consistent." Findings of Fact ¶ 57. The court found the testimony of Robert Moore, the principal draftsman of the Memorandum, particularly "credible and authoritative." Findings of Fact ¶ 69.

formed prior to the Sandinista revolution; Nicaragua's obligations to assume certain debts and to purchase certain assets would depend upon an audit according to generally accepted accounting and evaluation principles; Nicaragua would have to form a "competent national entity" that would enter into contracts with the banana production societies as a prerequisite to a fruit-purchase contract between Standard Fruit and the "competent national entity"; and many significant terms in the contemplated fruit-purchase contract required extensive negotiation: definitions of "quality," the price of other than first-quality fruit, payment terms, the effective date, the choice of law, shipping schedules, and provisions for renegotiating prices.

The Memorandum's conclusion observes:

> in accordance with the spirit of compatibility and cooperation evidenced during the *negotiations hereinabove memorialized*, the Government of Nicaragua and Standard Fruit *will* take all such further actions and execute and deliver all such applications, decrees, documents and/or other papers as are necessary to the full accomplishment of the *aims* expressed herein.

(Emphasis added.)

Much of the Memorandum, including the arbitration language, was extensively renegotiated between January 11, 1981 and October 25, 1982. Nicaragua's drafts departed markedly from even those few terms that had been defined clearly in the Memorandum of Intent. Each of the fruit purchase and technical assistance contract drafts exchanged between the parties over 20 months contained its own arbitration clause, and the parties continued to bargain over the

mechanisms to be used, the scope of the clauses, and the forum for arbitration.

During the course of negotiations, Standard Fruit resumed operations in Nicaragua in good faith pursuant to the limited guidelines in the Memorandum. For example, it bought first-quality bananas at $4.30 per box, the price agreed in the Memorandum, provided technical assistance in connection with the growing of bananas, and deducted 50¢ per box for amortization of the value of its assets and 25¢ per box for technical assistance.[6]

After one year and eight months of negotiations, none of the contracts contemplated in the Memorandum was ever finalized or signed. Nicaragua's requisite "competent national entity" never entered into a contract with the production societies to purchase their bananas for resale, and there was therefore never a fruit purchase contract between the "competent national entity" and Standard Fruit. The parties never signed a technical assistance contract, nor did they execute documents establishing the Government's assumption of the partnerships' debts (which represented a large part of Standard Fruit's assets in Nicaragua). The consent required of all the partners to authorize Standard Fruit's transfer of its in-

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[6] James Sousane, General Manager of Standard Fruit's Nicaragua Division, "returned to Nicaragua and operated on the assumption that the fruit purchase contracts and technical assistance contract would eventually be concluded." Findings of Fact ¶ 33. "Standard Fruit's conduct pending execution of implementing contracts was based not on its understanding that the Memorandum was a contract requiring it to return to Nicaragua immediately, but on a good faith desire to further the interest of all parties involved." Findings of Fact ¶ 35.

terest in the partnerships to Nicaragua was never obtained. Standard Fruit's preexisting lease and fruit purchase contracts with its partners and the production societies were never officially resolved.

Months of protracted negotiation failed to produce an agreement, and conditions for the conduct of business by U.S. multinationals deteriorated under the Sandinistas. Standard Fruit ceased its banana growing and purchasing activities in Nicaragua on October 25, 1982. The parties had never even signified accord on the guidelines in the Memorandum, much less the multiple essential terms it left to negotiation. Nor did Nicaragua ever, in the ensuing four years, suggest that Standard Fruit's failure to buy bananas after October 1982 was an arbitrable breach of the Memorandum of Intent.

The facially preliminary nature of the Memorandum of Intent cast doubt on whether it reflected a binding agreement, 9 U.S.C. § 4, and the district court therefore considered the factual questions of context and intent. The court found, based on its assessment of the language in the Memorandum, the circumstances of the negotiations, and the relative credibility of the witnesses as to both parties' intent, that the "Memorandum reflected a mere agreement to agree" and that "the Memorandum of Intent does not contain a present agreement among the signatories to submit to arbitration, but rather contains a provision declaring the expectations of the parties that contracts to be negotiated later would include agreements to arbitrate." Findings of Fact ¶¶ 63, 65.

The Appellate Court's Basis for Reversal

On July 1, 1991, the Ninth Circuit reversed the judgment and remanded the case for an order di-

recting arbitration. The panel held that "[d]eterminations of arbitrability, like the interpretation of any contractual provision, are subject to *de novo* review." 937 F.2d at 474. The panel therefore independently reviewed the district court's Findings of Fact and Conclusions of Law. It held that the district court erred in considering the language of the Memorandum as a whole, and that evidence of whether the parties actually intended the Memorandum to be binding was irrelevant. 937 F.2d at 479. The panel held that "where the parties admit to signing *a document* that contains an arbitration provision, . . . all questions regarding breach of *the agreement* must be referred to arbitration." 937 F.2d at 477 (emphasis added).

REASONS FOR GRANTING WRIT

The Ninth Circuit panel characterized the district court's three-day evidentiary hearing as an exercise in contract *interpretation*, and thus subject to *de novo* review. 937 F.2d at 474. Contract interpretation, however, presupposes the existence of a "contract." The panel's imposition of a contract as a matter of law, contrary to the factual finding of the district court, violates Rule 52(a) of the Federal Rules of Civil Procedure and the Federal Arbitration Act, which provides for a jury trial to determine the facts of whether the parties entered into a binding arbitration agreement. 9 U.S.C. § 4.

The Ninth Circuit panel disregarded the district court's factual findings and rendered the opposite judgment by severing the arbitration language from its context and reciting the federal policy favoring arbitration. All that a court need determine, according to the panel, is that "the parties admit to signing a

document containing an arbitration provision." 937 F.2d at 477 (emphasis added). The document need not reflect an agreement at all, much less an agreement to arbitrate. This proposition violates numerous precedents of this Court and others emphasizing that a party cannot be forced into arbitration absent a binding arbitration agreement, and misinterprets this Court's pronouncement in *Prima Paint v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967) (arbitrator must decide defense of fraudulent inducement of contract containing otherwise valid and binding arbitration provision if defense does not apply directly to arbitration provision). Nothing in *Prima Paint* nullifies the district court's statutory duty to examine the context of ambiguous arbitration language and the intent of the parties on the *threshold* issue of whether the parties ever intended to enter into any contract.

I. The Panel Violated Federal Procedure and Split With Other Circuits by Reviewing *De Novo* the District Court's Factual Findings Concerning the Existence of a Binding Arbitration Agreement.

When the making of an arbitration agreement is "in issue," the Federal Arbitration Act contemplates a factual inquiry to resolve that issue, and even provides for a jury trial to determine it. 9 U.S.C. § 4. The scope of that factual inquiry plainly embraces Petitioners' contention that the parties never entered a binding agreement. *See Par-Knit Mills, Inc. v. Stockbridge Fabrics Co.*, 636 F.2d 51, 54 (3d Cir. 1980) (order to arbitrate requires "express, unequivocal agreement to that effect. If there is doubt as to whether such an agreement exists, the matter . . . should be submitted to a jury."). Because Standard Fruit did not request a jury, Judge Vukasin sat as

factfinder.[7] The panel should not have disregarded application of Rule 52(a) to Judge Vukasin's Findings of Fact since one party alleged and the other denied that there existed an arbitration contract.

The panel's conceptual error is manifest on the face of its pronouncement of independent review: "[d]eterminations of arbitrability, like the interpretation of any contractual provision, are subject to *de novo* review." 937 F.2d at 474. The issue that preceded "contract" interpretation, indeed the issue that triggered the § 4 trial, was whether there ever existed a contract to interpret. That dispute could not be resolved as a matter of law. *See Par-Knit*, 636 F.2d at 54 ("Only if there is no genuine issue of fact concerning the formation of the agreement should the court decide as a matter of law that the parties did or did not enter into [an arbitration] agreement.").

Only by *assuming* that the parties achieved a meeting of the minds, only by appellate fact-finding of the existence of a contract, could the panel characterize its review as exclusively "contract interpretation." But settled federal procedure admits no such maverick appellate rendering of a factual issue, contrary to the district court finding, unless: (1) the district court's decision was clearly erroneous; and (2) "the record permits only one resolution of the factual issue." *Pullman Standard v. Swint*, 456 U.S. 273, 291-

[7] The panel conceded that the district court acquired jurisdiction to decide arbitrability only because Standard Fruit did not demand a jury trial. 937 F.2d at 475 n.8. A jury finding that the parties did not enter into an arbitration agreement would plainly have precluded independent review. Had a jury therefore concluded precisely as did the district court, the panel presumably would not have confused the appropriate standard of review.

92 (1982). "Rule 52(a) broadly requires that findings of fact not be set aside unless clearly erroneous. It does not make exceptions or purport to exclude certain categories of factual findings from the obligation of a court of appeals to accept a district court's findings unless clearly erroneous." *Id.* at 287.

Against the foregoing fundamental propositions of appellate procedure, and against the weight of authority in circuits that have addressed this issue, the panel cited distinguishable cases that involve reviewing the scope of arbitration language in an *acknowledged* contract. The panel curiously signals its creation of a circuit split by citing, without discussion, a Second Circuit case that directly conflicts with its conclusory rejection of Standard Fruit's "proposed 'clearly erroneous' 'especially deferential' standard of review." 937 F.2d at 474, *citing Interocean Shipping Co. v. National Shipping and Trading Corp.*, 523 F.2d 527 (2d Cir. 1975), *cert. denied*, 423 U.S. 1054 (1976).

In *Interocean Shipping*, as here, the parties disputed "whether there was a meeting of the minds on [the] essential terms" of a contract containing an arbitration provision. *Id.* at 534. The district court held a four-day evidentiary hearing, decided that a contract did exist, and ordered arbitration accordingly. *Id.* The Second Circuit held that "[w]hether there was a meeting of the minds is a question of fact" subject to Rule 52(a), and affirmed because the district court's "findings that a valid charter party existed were not clearly erroneous." *Id. See also Nordin v. Nutri/System, Inc.*, 897 F.2d 339, 344 (8th Cir. 1990) ("to the extent that the district court's order [denying arbitration] is based on factual findings, our review is guided by the clearly erroneous standard"). The Sec-

ond and Eighth Circuits, as well as the Third Circuit in *Par-Knit*, thus delineate the proper standard from which the Ninth Circuit now departs.

The panel fails to appreciate the fundamental distinction between a dispute over the scope of language in an *acknowledged* agreement, and a genuine dispute that any agreement ever existed. The following two cases cited by the panel[8] underscore the distinction. "[T]he issue of arbitrability is a question for the courts and is to be determined by the *contract entered into by the parties.*" *Drake Bakeries, Inc. v. Local 50, Am. Bakery & Confectionery Wkrs. Int'l*, 370 U.S. 254, 256 (1962) (emphasis added) (holding employer's claim against union within scope of arbitration provision in acknowledged contract); *accord Mediterranean Enterprises, Inc. v. Ssangyong Corp.*, 708 F.2d 1458, 1462-63 (9th Cir. 1983) (interpreting words of arbitration provision in acknowledged contract). *See also Nordin*, 897 F.2d at 344 (district court order denying arbitration "reviewed *de novo* only to the extent we are reviewing the actual language of the arbitration agreement" but factual findings "guided by the clearly erroneous standard").

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[8] The panel also cited *In re Bubble Up Delaware, Inc.* , 684 F.2d 1259 (9th Cir. 1982) (construing liquidated damages provision of contract) to support *de novo* review of "contract interpretation." In *Bubble Up Delaware*, however, the facts were not significantly disputed, and the Ninth Circuit simply noted in dicta that the district court incorrectly portrayed a legal conclusion as a factual finding. *Id.* at 1262. The district court in this case did not incorrectly portray its legal conclusions as factual findings, and the panel did not so hold. *Bubble Up Delaware* therefore fails to support the panel's overbroad assertion that all aspects of arbitrability determinations, including findings of fact, are subject to *de novo* review.

The district court based its factual findings not only on the voluminous documentary evidence before it, but on the strength of its credibility determinations, which this Court has characterized as especially deserving of appellate deference.

> When findings are based on determinations regarding the credibility of witnesses, Rule 52(a) demands even greater deference to the trial court's findings; for only the trial judge can be aware of the variations and demeanor and tone of voice that bears so heavily on the listener's understanding of and belief in what is said. . . . When a trial judge's finding is based on his decision to credit the testimony of one of two or more witnesses, each of whom has told a totally coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can virtually never be clear error.

Anderson v. Bessemer City, N.C., 470 U.S. 564, 573 (1985).

The district court heard three days of live testimony, and specifically found that "the testimony of defendants' witnesses that the Memorandum was not intended as a binding contract [was] credible and consistent with the document's language, the surrounding circumstances, and the parties' contemporaneous conduct," and further that "the testimony of plaintiff's witnesses that the Memorandum was intended as a contract [was] less credible and consistent." Findings of Fact ¶ 57. The court notably credited the testimony of the principal draftsman as to the meaning of the ambiguous language of the provision.

> The Court finds Mr. Moore's testimony that the word "arrangements" in Paragraph IV meant the contracts contemplated in the Memorandum to be credible and authoritative. Therefore, the phrase in Paragraph IV of the Memorandum, "disputes arising under the arrangements contemplated hereunder," could at best encompass only disputes relating to the interpretation or performance of any contracts to be made by the parties which were "contemplated" in the Memorandum of Intent, such as the contracts for fruit sales, technical assistance, asset sales, and sales of partnership interests. Those final contracts contemplated were never concluded. Therefore, no disputes, including the disputes before this Court, can have arisen under them.

Findings of Fact ¶ 69.

The panel ignored the district court's credibility determinations even though it conceded two obvious predicates for deference to such factual findings: (1) the ambiguity of the arbitration provision, 937 F.2d at 476 ("the key language in Paragraph IV seems highly ambiguous, since it refers to 'the arrangements contemplated hereunder,' and thus requires extensive inquiry into just what arrangements are being referred to");[9] and (2) the relevance of the parties' intent, *id.* at 479 (asserting, incorrectly in Petitioners' view, that the district court failed to consider evidence "presented by Nicaragua as to the intent and scope of the arbitration agreement").

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[9] *See also* 937 F.2d at 473 ("Nicaragua admits that this [arbitration] clause is less than crystal clear and in fact refers to an association which does not exist.").

The Ninth Circuit itself, in a case cited but substantively ignored by the panel, 937 F.2d at 474, set forth the proper standard for review of findings relating to ambiguity and intent, and illuminated another critical distinction lost on the panel: identifying contractual ambiguity is a matter of law, but resolving that ambiguity is a matter of fact. *United States v. City of Twin Falls*, 806 F.2d 862, 869 (9th Cir. 1986), *cert. denied*, 482 U.S. 914 (1987).

> The determination of whether contract language is ambiguous is a matter of law. *In re U.S. Financial Securities Litig.*, 729 F.2d 628, 632 (9th Cir. 1984). "If a provision is ambiguous, however, its interpretation depends on the parties' intent at the time of execution." *Kemmis*, 767 F.2d at 597. The district court then should make factual findings as to the parties' actual intent. *Id.* The district court's factual findings concerning what the parties intended, said, and did are reviewed under the clearly erroneous standard. *Id.*; *Interpetrol Bermuda Ltd.*, 719 F.2d at 998; *see also Laborers Health & Welfare Trust Fund v. Kaufman & Broad*, 707 F.2d 412, 418 (9th Cir. 1983) (intent as issue for trier of fact).

Id. If the arbitration provision is ambiguous, and the district court could properly assess the parties' intent as to that provision, as the panel concedes, then factual findings thereupon trigger the clearly erroneous standard.[10] *See Swint*, 456 U.S. at 288 ("Treating is-

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[10] The panel held that whether the parties intended to be bound by the Memorandum was irrelevant, a conclusion which Petitioners dispute in the next section. But even if that extraordinary extension of *Prima Paint* were valid, and the panel

sues of intent as factual matters for the trier of fact is commonplace."); *Painewebber, Inc. v. Hartmann*, 921 F.2d 507, 510 (3d Cir. 1990) ("Because the interpretation of contractual language to discern contractual intent is a question of fact, our review is limited to a determination whether the district court's findings are clearly erroneous."); *FDIC v. Air Florida System, Inc.*, 822 F.2d 833, 836 n.2 (9th Cir. 1987) ("If ambiguity exists and the district court makes factual findings as to the parties' intent, the court's findings will not be disturbed unless clearly erroneous"); *Seaboard Coast Line R.R. Co. v. Trailer Train Co.*, 690 F.2d 1343, 1348 (11th Cir. 1982) ("A determination by a trial court of what was intended by the parties in their agreement [to arbitrate] is a question of fact, not to be disturbed by this court unless clearly erroneous.").

The panel was not at liberty to disregard the district court's findings absent clear error. The panel's disregard of the proper standard of review, its departure from precedent, and its creation of a circuit split on such a fundamental tenet of federal procedure demand this Court's attention. This Court should therefore grant the Petition for Certiorari, and ultimately restore the viability of Rule 52 in cases under the Federal Arbitration Act.

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could consider the arbitration provision in a vacuum, the panel remained bound to review for clear error the district court's factual findings on the parties' intent specifically with respect to the arbitration provision, and the resolution of ambiguity in that provision. The district court carefully distinguished these independent bases for denying the motion to compel arbitration. Findings of Fact ¶ 64, 68. The panel did not.

II. The Panel Misconstrued Supreme Court Precedent and Distorted Federal Arbitration Law by Severing Ambiguous Arbitration Language from Its Context in a Preliminary Document and Mandating Arbitration Despite the District Court's Factual Finding that the Parties Never Intended to be Bound.

The panel opinion collapses the 9 U.S.C. § 4 trial to a single dangerously simplistic inquiry: did the parties sign a piece of paper containing arbitration language? 937 F.2d at 477. This published holding stretches *Prima Paint v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967) far beyond its proper scope and in fact subverts the very policy favoring arbitration that the panel repeatedly states that it wants to promote.

This Court held in *Prima Paint* that the arbitrators, not the court, should decide whether a contract containing an arbitration clause that was clear on its face was fraudulently induced. Only if the allegation of fraudulent inducement went to the arbitration clause itself would the issue require judicial resolution. 388 U.S. at 402-04. An arbitration provision may therefore be "severable" from the contract in which it appears. *See, e.g., Matterhorn, Inc. v. NCR Corp.*, 763 F.2d 866, 868-69 (7th Cir. 1985) ("An arbitration clause will *often* be 'severable' from the contract in which it is embedded, in the sense that it *may* be valid even if the rest of the contract is invalid.") (emphasis added) (*cited in Smith Wilson Co. v. Trading and Development Establishment*, 744 F. Supp. 14, 17-28 (D.D.C. 1990) ("under certain circumstances—but not always—an arbitration clause is severable from the rest of the contract and therefore is not 'infected' by the dispute going to the contract's central purpose")).

In this case, however, both the appellate court and Nicaragua concede that the arbitration language in the Memorandum of Intent is "less than crystal clear" (937 F.2d at 473) and in fact "highly ambiguous" (*id.* at 476). Under the circumstances, a court simply cannot divorce the arbitration clause from the rest of the document and surrounding circumstances in order to determine if the arbitration language was intended by the parties as a binding agreement to arbitrate. In other words, the panel's misplaced insistence on severability begs the question of whether there ever existed a "contract" from which the arbitration provision could be severed. The Ninth Circuit itself recently dispelled the notion that *Prima Paint* required such question-begging:

> By contending that they never entered into such contracts, plaintiffs also necessarily contest any agreements to arbitrate within the contracts. *To require the plaintiffs to arbitrate where they deny that they entered into the contracts would be inconsistent with the "first principle" of arbitration* that "a party cannot be required to submit [to arbitration] any dispute which he has not agreed so to submit." *AT&T Technologies, Inc. v. Communications Workers*, 475 U.S. 643, 648.

Three Valleys Municipal Water District v. E.F. Hutton & Co., 925 F.2d 1136, 1142 (9th Cir. 1991) (emphasis added); *see also I.S. Joseph Co. v. Michigan Sugar Co.*, 803 F.2d 396, 400 (8th Cir. 1986) (district court's conclusion that arbitrators should decide challenge to validity of assignment "assumes the existence of an agreement in the first instance. It begs the issue . . . that there is no contractual relationship"); *Pollux Marine Agencies, Inc. v. Louis Dreyfus*

Corp., 455 F. Supp. 211, 217 (S.D.N.Y. 1978) ("something can be severed only from something else that exists"). Quite simply, if the parties did not intend to promise anything, then neither did they promise to arbitrate. No case, except for the panel opinion, stands for the contrary proposition.[11]

It simply cannot be federal law that a signed paper containing "highly ambiguous" arbitration language dispatches the issue of arbitrability. Again, no case except the panel opinion so boldly holds. The cases upon which the panel relies pointedly illustrate the flaw of its *Prima Paint* extension. In *Prima Paint* itself, the question of whether the parties intended their contract to be binding at the time they signed it was not in issue. 388 U.S. at 406. It was clearly intended to be binding; the question was whether it had been fraudulently induced. Nor was there any doubt in that case that the parties had intended to make an immediately-effective agreement to arbitrate disputes.

Similarly, the panel's heavy reliance on *Sauer-Getriebe KG v. White Hydraulics, Inc.*, 715 F.2d 348 (7th Cir.), *cert. denied*, 464 U.S. 1070 (1984) again ignores the critical distinction therein that the arbitration clause in the agreement signed by the parties was, on its face, clearly and unequivocally intended as binding. *Id.* at 349. The Seventh Circuit simply

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[11] The appellate court conceded the logic of the district court's analytical framework, but erroneously concluded that the arbitration statute and *Prima Paint* compelled a different result. 937 F.2d at 476 n.10. Even so, the panel misunderstood the district court's framework. The district court did not analyze the contractual "validity" of the Memorandum; it considered only whether the parties intended to be bound by it.

held, consistent with *Prima Paint*, that allegations of lack of consideration, unconscionability, and vagueness did not retroactively nullify the arbitration agreement because that agreement did not suffer any of the alleged defects of the rest of the contract. "Sauer's promise to arbitrate was given in exchange for White's promise to arbitrate and each promise was sufficient consideration for the other." *Id.* at 350. Here, by contrast, both the arbitration language and the document as a whole were highly ambiguous, and the district court rightly considered extrinsic evidence and language before determining as a factual matter that there was no mutual promise to arbitrate because there was no mutual promise at all.

Arbitration language subject to the doctrine of severability does not occupy an analytical vacuum. An arbitration provision is not exempt from the rudiments of contract law. "The mere execution of a document, however, even assuming that it is executed by a corporate agent, does not negate the factual assertion that such signature was not intended to represent a contractual undertaking." *Par-Knit Mills*, 636 F.2d at 54-55 (holding that a denial, supported by affidavit, that an arbitration agreement was made would be sufficient to require a jury—i.e., a factual—determination on whether there had been a meeting of the minds). Here, the district court necessarily inquired whether the parties actually assented to be bound by the arbitration language.[12] In examining and

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[12] The district court could not properly evade this necessarily factual inquiry simply because some of the facts that bore on whether minds had met overlapped with the merits of the underlying dispute. *See Marshall v. Green Giant Co.*, 942 F.2d 539, 547 (8th Cir. 1991) (district court's "obligat[ion] to determine

resolving that threshold question, the district court properly considered, *inter alia*, the following:

- The Memorandum preamble recites that its sets forth only agreement "in principle," language added at the insistence of the Nicaraguans. Findings of Fact ¶¶ 23, 32(b).
- Article VIII specifically characterizes the Memorandum as "memorialized negotiations." Findings of Fact ¶ 32(d).
- Nicaragua inserted language, both in the arbitration provision and elsewhere, to make the document *less* definite. Findings of Fact ¶¶ 23, 61.
- Specific binding contracts were to be concluded only after certain conditions relating to third parties had occurred. Findings of Fact ¶¶ 25-29, 32(c).
- Essential details were omitted, not only from the arbitration clause, but throughout the Memorandum. Findings of Fact ¶¶ 27, 32(d), 48.
- All drafts of the contracts contemplated by the Memorandum contained arbitration clauses, and these clauses differed markedly in form and content from the arbitration language in the Memorandum. Findings of Fact ¶¶ 44, 45.

The district court properly considered the foregoing facts, as well as extrinsic evidence, to determine

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whether the arbitration agreement was enforceable . . . did not disappear merely because the topic of enforcement involved issues or facts that were likely to arise again elsewhere in the case").

whether a contract existed, and to resolve any ambiguity of the arbitration language. The fact that the parties signed a "document" does not mean that they created an agreement. The panel's aberrant conclusion to the contrary requires this Court's intervention to restore the integrity of federal arbitration law and proper adherence to this Court's precedents in *Prima Paint* and *AT&T Technologies*.

Ironically, the Ninth Circuit holding subverts the federal policy favoring arbitration, which the panel repeatedly recites, by threatening absurd results. Suppose, for example, that two parties memorialize discussions in a signed document entitled "Guidelines for Future Negotiation" and state in Paragraph 1 that the provisions are not binding. If Paragraph 20 contains the rudiments of an arbitration clause, e.g., "All contractual disputes will be resolved by arbitration as agreed by the parties," the Ninth Circuit's doctrinaire insistence on severance would require the court to disregard what, upon full reading of the document, was plainly the intent of the parties. If upheld, the panel holding would cause undue concern that any pre-contractual discussions about the possibility of arbitration would compel dispute resolution in a forum they would not have chosen for certain types of disputes. Parties mindful of the Ninth Circuit precedent would likely tend to avoid discussions about arbitration provisions altogether.[13] These practical conse-

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[13] *See National R.R. Passenger Corp. v. Boston and Maine Corp.*, 850 F.2d 756, 760 (D.C. Cir. 1988) (noting that federal policy favoring arbitration cannot override the will of the parties by giving arbitration clause greater coverage than parties intended, and that "private parties may be reluctant to agree to arbitration if they believe that, despite their best efforts to ex-

quences of the panel precedent, quite apart from its legal infirmities, underscore the ironic and undesirable impact on federal arbitration policy that this Court should redress.

The legal infirmities of the panel decision, however, threaten a more fundamental disruption. Federal arbitration jurisprudence rightly promotes the benefits of arbitration, but this Court's emphasis on the desirability of commercial arbitration was never intended to manufacture binding arbitration contracts out of preliminary negotiations. *See Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989) (purpose of Arbitration Act is "'to make arbitration agreements as enforceable as other contracts, but not more so'"), *quoting Prima Paint*, 388 U.S. at 404 n.12; *McDonnell Douglas Finance Corp. v. Pennsylvania Power & Light Co.*, 858 F.2d 825, 831 (2d Cir. 1988) ("[F]ederal policy alone cannot be enough to extend the application of an arbitration clause far beyond its intended scope."). The panel holding distorts the federal favoring of arbitration by employing that policy to circumvent the most fundamental axiom of contract law: the assent of the parties.

CONCLUSION

The Ninth Circuit panel's maverick application of *de novo* review violates settled federal procedure and departs from the precedent of other circuits. Its repudiation of the district court's findings misconstrues this Court's directive in *Prima Paint* and disrupts

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press their wishes to the contrary, any slight ambiguity in their words or deeds can be seized upon to extend their obligation to arbitrate beyond the terms of their contract.").

the smooth intersection of federal arbitration law and contract law established by statute and by this Court's pronouncements in *AT&T Technologies*. Its mischief warrants review and reversal.

Respectfully submitted,

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Dated: January 15, 1992

APPENDIX

APPENDIX A

United States Court of Appeals,
Ninth Circuit.

Nos. 88-2585, 89-15803.

REPUBLIC OF NICARAGUA, a foreign sovereign, Plaintiff-Appellant,

v.

STANDARD FRUIT COMPANY, Standard Fruit and Steamship Company, and Castle & Cooke, Inc., Defendants-Appellees.

Argued and Submitted Oct. 3, 1990.
Decided July 1, 1991.

A foreign government moved to enforce an arbitration clause contained in a "Memorandum of Intent" with corporations engaged in fruit business, regarding the production and distribution of bananas. The United States District Court for the Northern District of California, John P. Vukasin, Jr., J., denied motion. Appeal was taken. The Court of Appeals, Ferguson, Circuit Judge, held that: (1) trial court erred by determining validity of arbitration clause in reference to portions of the memorandum of intent outside of the arbitration clause; (2) arbitration clause was a binding provision; and (3) material issues of fact, precluding summary judgment, existed as to whether subsidiary of parent and grandparent corporations which had signed memorandum was bound by arbitration clause.

Reversed and remanded.

1. Arbitration - 73.7(4)

Trial court determinations of arbitrability, like interpretations of any contractual provision, are subject to de novo review by Court of Appeals.

2. Arbitration - 23.7

District court has little discretion to deny arbitration motion under Federal Arbitration Act, as Act is phrased in mandatory terms. 9 U.S.C.A. § 1 et seq.

3. Arbitration - 6

Trial court erred by determining that arbitration provision contained in a "Memorandum of Intent" regarding the production and sale of bananas, which was severable from remainder of memorandum, was invalid on grounds that the rest of the memorandum did not establish a contractual relationship between parties; trial court should have determined arbitrability by reference only to the arbitration clause. 9 U.S.C.A. § 1 et seq.

4. Arbitration - 23.14, 23.16

Courts are strictly limited when determining arbitrability of disputes and enforcing agreements to arbitrate, and must leave merits of claim and any defenses to arbitrator.

5. Arbitration - 6

Trial court incorrectly determined that arbitration provision in "Memorandum of Intent" regarding production and sale of bananas, stating that "any and all disputes arising under the arrangements contemplated hereunder" were to be committed to arbitration, was not sufficiently specific to be enforceable.

6. Arbitration - 23.7

Trial court determining that arbitration provision contained "Memorandum of Intent" regarding production and sale of bananas did not commit parties to arbitrate erred

by considering evidentiary factors contained in portions of the memorandum other than arbitration clause.

7. Arbitration - 6.1

Trial court improperly found that arbitration provision contained in "Memorandum of Intent" covering production and sale of bananas was invalid, based upon failure of corporation closely involved with banana activities to sign memorandum.

8. Arbitration - 23.7

A foreign government's six-year delay in enforcing arbitration provision of "Memorandum of Intent" governing production and sale of bananas did not preclude assertion of such rights; efforts had been made to settle dispute informally prior to invoking request for arbitration.

9. Arbitration - 6

Arbitration provision contained in "Memorandum of Intent" regarding production and sale of bananas was not invalidated by the placement of arbitration clauses in drafts of agreements intended to replace memorandum.

10. Federal Civil Procedure - 2510

Trial court improperly entered summary judgment on question of whether "Memorandum of Intent" regarding production and sale of bananas was binding contract; district court had relied improperly on credibility findings.

11. Arbitration - 23.15

Question of whether a subsidiary of a corporation which signed a "Memorandum of Intent" regarding production and sale of bananas was bound by arbitration clause was for court rather than arbitrator.

12. Federal Civil Procedure - 2510

Material issues of fact, precluding summary judgment, existed as to whether parent and grandparent corporations

which had signed "Memorandum of Intent" regarding the production and sale of bananas were the ostensible agents of subsidiary which had not signed memorandum, so as to bind subsidiary to arbitration provision of memorandum; all parties to memorandum had treated all three corporations as one entity, subsidiary had opened negotiations leading to memorandum, and subsidiary's general manager testified he did not know which corporation he had been representing in negotiations leading to memorandum.

13. Federal Civil Procedure - 2510

Material issues of fact, precluding summary judgment, existed as to whether subsidiary which had not signed a "Memorandum of Intent" regarding the production and distribution of bananas was bound by agreement signed by its parents and grandparent corporations, by virtue of ratification, so as to be subject to the arbitration provision of the memorandum; subsidiary had operated pursuant to terms of memorandum during a 22-month period after it was signed.

Judith C. Appelbaum, Reichler, Choate, Appelbaum & Wippman, Washington, D.C., and Paul J. Laveroni, Cooley, Godward, Castro, Huddleston & Tatum, San Francisco, Cal., for plaintiff-appellant.

Steven M. Schneebaum, Patton, Boggs & Blow, Washington, D.C., for defendants-appellees.

Appeal from the United States District Court for the Northern District of California.

Before SCHROEDER, FERGUSON and BRUNETTI, Circuit Judges.

FERGUSON, Circuit Judge:

The Republic of Nicaragua appeals from two orders of the district court which denied its motion to compel in-

ternational arbitration of a contract dispute (Count I) and granted summary judgment to Standard Fruit Company ("SFC") and its two parent companies, Standard Fruit and Steamship Company ("Steamship") and Castle & Cooke, Inc., ("C & C"),[1] on Nicaragua's breach of contract claim (Count II).

Nicaragua raises three points on appeal. First, it argues that the questions of whether a document entitled "Memorandum of Intent" was a valid contract and whether Standard Fruit Company was bound by that contract should have been referred to arbitration in the first instance, not decided by the district court. Secondly, it contends that disputed issues of material fact exist on the question of whether the Memorandum of Intent was a binding contract for the purchase and sale of bananas, or merely an "agreement to agree" at some later date. Finally, Nicaragua alleges that a factual dispute exists on the question of whether the Memorandum of Intent was executed on behalf of SFC, thus precluding summary judgment on that issue as well.

We hold that although it was the court's responsibility to determine the threshold question of arbitrability, the district court improperly looked to the validity of the contract as a whole and erroneously determined that the parties had not agreed to arbitrate this dispute. Instead, it should have considered only the validity and scope of arbitration clause itself. In addition, the district court ignored strong evidence in the record that both parties intended to be bound by the arbitration clause. As all doubts over the scope of an arbitration clause must be resolved in favor of arbitration, and in light of the strong federal policy favoring arbitration in international commercial disputes, Nicaragua's motion to compel arbitration should have been granted. Whether the Memorandum was binding, whether it covered banana purchases, and whether

[1] The three companies are herein referred to collectively as "Standard."

Standard Fruit Company was bound by it are all questions properly left to the arbitrators. Finally, genuine disputes of fact exist as to the intent of the parties and the validity and scope of the Memorandum. Therefore, the grant of summary judgment to the three defendants is reversed.

FACTS

Since 1970, defendant Standard Fruit Company has been involved in the production and purchase of bananas in western Nicaragua. It is a wholly-owned subsidiary of Standard Fruit and Steamship Company, which purchases the bananas from SFC and transports and distributes them in the U.S. Steamship in turn is a wholly-owned subsidiary of C & C. From 1970 until October 1982, SFC operated by entering into limited partnership agreements with sixteen different landowners in Chinandega Province, Nicaragua. The equity interest in the partnerships[2] were allocated such that the landowners held 80% and SFC held 20%. Secondly, SFC leased the 16 banana plantations from their owners and assigned those leases to the partnerships. Third, each partnership entered into an exclusive fruit purchase agreement with SFC, promising to sell all export-quality bananas from its plantations to SFC.

A. THE REVOLUTION

In 1979, the Sandinistas overthrew the Somoza government in Nicaragua, forming a new "Government of National Reconstruction," led by a three-person *junta*. The Sandinistas wished to assume closer control over the banana industry, and eventually to transfer SFC's shares in the partnerships to the Nicaraguan government. For over a year, the new government discussed these issues with SFC's representative in Nicaragua, General Manager James Sousane.

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[2] These limited partnerships are also referred to as "banana production societies" and "banana programs."

On June 23, 1980, Nicaraguan Minister of Foreign Trade Alejandro Martinex Cuenca sent Sousane a memo (at Sousane's request) which proposed a set of basic guiding principles for the new contractual relationship between the Republic of Nicaragua and SFC, including the transfer proposal mentioned above. SFC objected to this proposal on the grounds that it could not transfer its 20% share in the partnerships to the government without the consent of its partners. Negotiations continued on this and other points until December 20, 1980.

On that date, Nicaragua promulgated "Decree No. 608," which declared that the banana industry was to become a state monopoly, that all plantation leases would be transferred to a new government agency, and that all preexisting lease, partnership, and fruit purchase contracts were nullified. SFC interpreted this decree as an expropriation of its business, and immediately ceased all operations in Nicaragua. Sousane and a few key employees left the country, and no more bananas were purchased. Both sides were surprised and upset by the issuance of the decree and the almost immediate withdrawal of SFC, with the bananas still ripe on the trees and ready to pick. As a result, Nicaragua requested a "summit meeting" at which SFC and its two parent companies, Steamship and C & C, could sort out their differences with the Sandinistas and come back to the country. The situation had obviously reached crisis proportions.

B. THE MEMORANDUM

The meeting commenced in San Francisco on Friday, January 9, 1981, and continued for three days of intense negotiations, led by C & C Vice-President and General Counsel Robert Moore (principal draftsman of the Memorandum) and Norton Tennille, Nicaragua's legal counsel. On Sunday, January 11, a document entitled "Memorandum of Intent" was executed by two officers of C & C, two officers ofSteamship, and two Ministers of Trade and

a member of the ruling *junta* of Nicaragua. Sousane and other SFC representatives participated in the negotiations but did not sign the document.[3]

The Memorandum, termed an "agreement in principle," contained an arbitration provision, and envisioned the renegotiation and replacement of four operating contracts between SFC and "the competent Nicaraguan national entity."[4] These were to include a detail fruit purchase contract, a technical assistance contract, the transfer of SFC's shares in the production societies, and Nicaragua's purchase of SFC's assets in the country. The Memorandum also established the essential elements of the fruit purchase contract: a price term ($4.30 per box, less specified deductions), the length of the contract (five years, although no dates were specified), and stated that it would cover all the first-quality bananas produced by the Nicaraguan growers. Additional provisions rescinded the terms of Decree 608 for five years, reinstated SFC's favored tax status, and clarified the financing arrangements for Nicaragua's banana industry.

Within a week after the Memorandum was signed, SFC returned to Nicaragua and resumed its operations there. In addition, it began negotiating with Nicaraguan officials regarding the technical assistance and fruit purchase contracts referred to in the Memorandum, as well as the share transfers and asset buy-outs. Many subsequent drafts of these four documents were exchanged, some similar to the

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[3] SFC itself was bound by an intricate mesh of prior exclusive contracts with the banana societies and therefore was not able to commit to the Memorandum without resolving its other commitments first and/or obtaining the consent of its partners.

[4] This entity, apparently set up in 1980 or 1981, was called BANANIC, and worked with the partnerships and SFC until mid-1981. At that point, another government agency was created, called the Programa Bananero de Occidente, or EMBANOC, which also dealt with SFC until its final departure from the country in October 1982.

Memorandum and some not, although none were ever finalized and executed.

Throughout the negotiations and for the next 22 months, SFC complied with the terms of the Memorandum as though it were bound by it. For example, it began paying $4.30 per box of bananas, rather than $1.26 as it had been paying up to that time, and bought over $30 million worth of bananas at that price. Nicaragua, in turn, began allowing the $.75 per box deduction, for asset buy-back, debt reduction and technical assistance, for a total rebate of over $3.5 million to SFC over the two years. During this period, C & C and SFC produced and disseminated a number of documents which referred to the Memorandum as a "a contract," a "commitment," or "a final agreement," several of which were signed and/or approved by Robert Moore. These included a C & C press release sent out the day after the Memorandum was signed, SEC reports, Annual Reports, letters, telexes, letters to the editor, and internal memoranda. Although SFC, Steamship, C & C, and Nicaragua all acted as though the Memorandum was binding for almost two years, the implementing contracts were never finalized, and SFC left Nicaragua for good on October 25, 1982.

The arbitration clause states that:

> Any and all disputes arising under the arrangements contemplated hereunder . . . will be referred to mutually agreed mechanisms or procedures of international arbitration, such as the rules of the London Arbitration Association.

Nicaragua admits that this clause is less than crystal clear and in fact refers to an association with does not exist. However, it introduced a letter written by Robert Moore, principal draftsman of the Memorandum to explain the inconsistency. The letter, written to Nicaragua's representative only three weeks after the negotiations, described the "deep sense of urgency on both sides," the

"exceedingly tight time schedule," and the "highly political nature of the agreement (from the Nicaraguan standpoint)." It explained that, during the negotiations themselves, neither side could remember the name of the arbitration body in London, and stated: "What resulted was *an agreement providing for arbitration* but without finally fixing the forum or an automatic method of transmitting disputes." Moore suggested "we would be better off agreeing in advance that Paragraph IV was to be read and interpreted to provide for arbitration by [a certain] agency," and concluded "I am sure you will agree that it is best done *in the infancy of the agreement and at a time that negotiations of the implementing agreements are being worked out.*" (Emphasis added).[5] Although this letter seems to suggest both that C & C intended the clause to be binding and that the parties intentionally left it vague because they could not remember the name of the London arbitration agency, the district court disregarded this evidence.

C. THE DISTRICT COURT OPINION

The district court applied a three-part test for arbitrability: "first, whether the parties entered into a contract; second, that the contract included an agreement to arbitrate disputes, and third, that the disputes covered by the arbitration agreement included those which are before the Court." It then proceeded to find that the Memorandum as a whole was not a binding contract, that the arbitration provision was not a present agreement to submit to arbitration, but merely "a provision declaring the expectations of the parties that contracts to be negotiated later would include agreements to arbitrate," and that in any event the scope of the clause was not broad enough to require arbitration of the Memorandum's enforceability.

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[5] Attached to the letter was a very explicit page-long "substitute arbitration clause," providing for arbitration in London pursuant to the Arbitration Act of Great Britain.

The court determined that the phrase "all arrangements contemplated hereunder" in Paragraph IV referred only to the "implementing agreements" subsequently to be negotiated, executed, and performed in Nicaragua, and not to the Memorandum itself.

JURISDICTION

Diversity jurisdiction over the two issues in this consolidated appeal is proper under 28 U.S.C. §§ 1332(a)(4) & 1603(a), since the case involves a lawsuit between a foreign state and American citizen corporations. As noted above, both the denial of arbitration (Count I) and the grant of summary judgment on the breach of contract claim (Count II) are properly before this court. Other counts alleged in the complaint remain before the direct court.[6]

I. *NICARAGUA'S MOTION TO COMPEL*

Nicaragua contends that the district court erred in denying its motions to compel international arbitration of its breach of contract claim and to stay judicial proceedings pending arbitration. It claims that the court should have limited its inquiry to the narrow question of whether the parties had, in fact, agreed to submit the validity of the contract itself to arbitration. Instead, the district court first determined that no binding sales contract existed between the parties and then proceeded to conclude, based on a preponderance of the evidence standard, that there was also no agreement to arbitrate. In the alternative, the court also found that the scope of the arbitration clause

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[6] We determined in an earlier order that interlocutory appeal was available for denial of a motion to compel arbitration under 28 U.S.C. § 1292(a)(1). *See* Order of March 9, 1989, No. 88-2585, and 9 U.S.C. § 16(a)(1). The district court certified its grant of summary judgment on the breach of contract claim (Count II) for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). This court granted permission to appeal and consolidated the two cases.

did not cover the question of whether the Memorandum of Intent was a binding contract.[7]

[1] Determinations of arbitrability, like the interpretation of any contractual provision are subject to *de novo* review. *Mediterranean Enterprises, Inc. v. Ssangyong Corp.*, 708 F.2d 1458, 1462-63 (9th Cir. 1983); *In re Bubble Up Delaware, Inc.*, 684 F.2d 1259, 1264 (9th Cir. 1982); *Drake Bakeries, Inc. v. Local 50, Am. Bakery & Confectionery Wkrs. Int'l*, 370 U.S. 254, 256, 82 S.Ct. 1346, 1348, 8 L.Ed.2d 474 (1962). We decline to adopt SFS's proposed "clearly erroneous" "especially deferential" standard of review on the threshold question of arbitrability. *Cf. Interocean Shipping Co. v. National Shipping and Trading Corp.*, 523 F.2d 527 (2d Cir. 1975), *cert. denied* 423 U.S. 1054, 96 S.Ct. 785, 46 L.Ed.2d 643 (1976). The district court's interpretation of the contract language is a question of law to be reviewed *de novo*. *United States v. City of Twin Falls*, 806 F.2d 862, 869 (9th Cir. 1986), *cert. denied* 482 U.S. 914, 107 S.Ct. 3185, 96 L.Ed.2d 674 (1987).

[2] Both parties agree that federal substantive law governs the question of arbitrability. *See Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24, 103 S.Ct. 927, 941, 74 L.Ed.2d 765 (1983); *Prima Paint v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967); *Mediterranean Enterprises*, 708 F.2d at 1463-4. The Federal Arbitration Act[8] reflects

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[7] Nicaragua also challenges the district court's grant of summary judgment on the issues of whether the Memorandum is a binding contract and agency, claiming that factual disputes exist and that the court's contrary conclusion was clearly erroneous. Since we vacate the grant of summary judgment and refer the contract issue to arbitration, we need not decide that question; see Section II for a discussion of the agency issue.

[8] The Federal Arbitration Act of 1925, codified at 9 U.S.C. § 1 *et seq.*, reflects the strong Congressional policy favoring arbitration by

"Congress' intent to provide for the enforcement of arbitration agreements within the full reach of the Commerce Clause." *Perry v. Thomas*, 482 U.S. 483, 490, 107 S.Ct. 2520, 2525, 96 L.Ed.2d 426 (1987).

> Section 2, therefore, embodies a clear federal policy of requiring arbitration unless the agreement to arbitrate is not part of a contract evidencing interstate commerce or is revocable "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

Id. at 489, 107 S.Ct. at 2525. The standard for demonstrating arbitrability is not a high one; in fact, a district court has little discretion to deny an arbitration motion, since the Act is phrased in mandatory terms. The Supreme Court has emphasized that the Act

> leaves no place for the exercise of discretion by a district court, but instead mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed.

Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 218, 105 S.Ct. 1238, 1241, 84 L.Ed.2d 158 (1985) (emphasis in

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making such clauses "valid, irrevocable, and enforceable." § 2. Section 4 states:

> The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration . . . is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. . . . If the making of the arbitration agreement . . . be in issue, the court shall proceed summarily to the trial thereof . . . . [T]he court shall hear and determine such issue [unless] the party *alleged to be in default* . . . demand[s] a jury trial of such issue . . .

9 U.S.C. § 4 (emphasis added). Since Standard has not demanded a jury trial on the issue of arbitration, the district court had jurisdiction to decide arbitrability.

original). Such agreements, if made, shall be "rigorously enforce[d]." *Id.* at 221, 105 S.Ct. at 1242. The Ninth Circuit agrees:

> Under Section 4 of the Act, the district court *must* order arbitration if it is satisfied that "the making of the agreement for arbitration . . . is not in issue . . ." Therefore, the district court "*can only* determine whether a written arbitration agreement exists, and if it does, enforce it 'in accordance with its terms.' "

Howard Elec. & Mech. v. Briscoe Co., 754 F.2d 847, 849 (9th Cir. 1985) (emphasis added, citations omitted). *See also Cone*, 460 U.S. at 15, 103 S.Ct. at 936.

However, this " 'liberal federal policy favoring arbitration agreements' . . . is at bottom a policy guaranteeing the enforcement of private contractual arrangements." *Mitsubishi Motor Corp. v. Soler Chrysler-Plymouth, Inc.* 473 U.S. 614, 625, 105 S.Ct. 3346, 3353, 87 L.Ed.2d 444 (1985) (quoting *Cone*, 460 U.S. at 24, 103 S.Ct. at 941). "Thus, as with any other contract, the parties' intentions control, but those intentions are generously construed as to issues of arbitrability." *Id.* 473 U.S. at 626, 105 S.Ct. at 3353. Therefore, the only issue properly before the district court was whether the parties had entered into a contract "evidencing a transaction involving commerce" under the Act and committing both sides to arbitrate the issue of the contract's validity.

Nicaragua contends that the court made three fundamental errors below. First, it argues that the district court improperly looked to the contract as a whole to determine arbitrability, which is impermissible under *Prima Paint v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967); secondly, that it held Nicaragua to an incorrect and overly harsh standard of proof for arbitrability, in violation of clear federal policy; and thirdly, that the court's interpretation of the scope of the arbitration clause was clearly erroneous on the factual record.

A. THE PRIMA PAINT DOCTRINE

[3] Nicaragua's primary claim is that the three-part test applied to determine whether the parties had in fact agreed to arbitrate violates *Prima Paint*, which expressly held that courts may not consider challenges to a contract's validity or enforceability as defenses against arbitration. 388 U.S. at 404, 87 S.Ct. at 1806. Relying on the "unmistakably clear congressional purpose that the arbitration procedure . . . be speedy and not subject to delay and obstruction in the courts," *id.*, *Prima Paint* demands that arbitration clauses be treated as severable from the documents in which they appear unless there is clear intent to the contrary. An arbitration clause may thus be enforced even though the rest of the contract is later held invalid by the arbitrator. *Accord, Teledyne, Inc. v. Kone Corp.*, 892 F.2d 1404, 1410 (9th Cir. 1990).

As the Arbitration Act only applies to "contracts evidencing transactions in commerce," courts must first make a threshold finding that the document at least purports to be such a contract. 9 U.S.C. § 2; *Prima Paint*, 388 U.S. at 401, 87 S.Ct. at 1804. However, in *Prima Paint* the Supreme Court did not rule on whether the contract was valid or enforceable—just that it existed. The Court rejected Prima Paint's argument that it could not be forced into arbitration because its entire contract (including the arbitration clause at issue) was fraudulently induced and therefore void. The Court held that because the fraud did not go into the making of the arbitration clause itself, the clause was severable and enforceable. *Id.* at 404, 87 S.Ct. at 1806. It therefore ordered the parties to proceed to arbitration of all disputed issues, including the questions of fraud in the inducement and the entire contract's validity.

In the instant case, the district court made a preliminary "Factual Conclusion" that the Memorandum "was not intended as a binding contract," in direct opposition to the

Prima Paint rule.[9] In addition to providing the basis for granting summary judgment on the merits, this conclusion is also the basis for the alternative holdings that no agreement to arbitrate existed, and that the present dispute lay outside the scope of the clause. All three holdings rely chiefly on the trial testimony of Robert Moore, who drafted most of the Memorandum, and on what the court termed the "unambiguous" language of the document itself. However, as Nicaragua correctly points out, Moore's testimony directly conflicts with contemporary documents in the record, which should have precluded any summary judgment. As a matter of law, the key language in Paragraph IV seems highly ambiguous, since it refers to "the arrangements contemplated hereunder," and thus requires extensive inquiry into just what arrangements are being referred to. Finally, many of the cases relied on by the district court are not controlling in this circuit, and several favor Nicaragua's position rather than SFC's.[10]

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[9] The district court reasoned that an arbitrator can derive his or her power only from a contract, so that when there is a challenge to the existence of the contract itself, the court must first decide whether there is a valid contract between the parties. Although this appears logical, it goes beyond the requirements of the statute and violates the clear directive of *Prima Paint*, 388 U.S. at 404, 87 S.Ct. at 1806. *See* discussion below.

[10] The district court relied heavily on a New York case, *Pollux Marine Agencies v. Louis Dreyfus Corp.*, 455 F.Supp. 211 (S.D.N.Y. 1978), which has never been followed in our circuit and conflicts with *Prima Paint* and *Mediterranean Enterprises*, 708 F.2d 1458 (9th Cir. 1983). *Pollux* denied arbitration on the grounds that a challenge to the entire contract went to "the making" of the arbitration clause, and that the scope of the clause at issue was narrow. *See* 455 F.Supp. at 218. Since *Pollux* is not the law in the Ninth Circuit, reliance on it here is questionable.

Several of the other cases cited below do not support the district court's conclusion. *See A.T.T. Technologies v. C.W.A.*, 475 U.S. 643, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986); *French v. Merrill Lynch*, 784 F.2d 902 (9th Cir. 1986); *Howard Elec. v. Frank Briscoe Co.*, 754 F.2d

For example, the district court cited *Georgia Power Co. v. Cimarron Coal Corp.*, 526 F.2d 101, 106 (6th Cir. 1975), *cert. denied*, 425 U.S. 952, 96 S.Ct. 1727, 48 L.Ed.2d 195 (1976), for the proposition that the arbitration provisions of a proposed agreement must be interpreted in their context rather than alone. However, that statement was made in reference to the strict presumption *favoring* arbitration, in the context of affirming an arbitration order. Thus, it has no relevance to *Prima Paint's* clear directive that courts disregard surrounding contract language and "consider only issues relating to the making and performance of the agreement to arbitrate." 388 U.S. at 404, 87 S.Ct. at 1806. The correct analysis is set forth in *Sauer-Getriebe KG v. White Hydraulics, Inc.*, 715 F.2d 348, 350 (7th Cir.1983), *cert. denied*, 464 U.S. 1070, 104 S.Ct. 976, 79 L.Ed.2d (1984):

> White argues that if there is no contract to buy and sell motors there is no agreement to arbitrate. The conclusion does not follow its premise. The agreement to arbitrate and the agreement to buy and sell motors are separate. Sauer's promise to arbitrate was given in exchange for White's promise to arbitrate and each promise was sufficient consideration for the other.

Id. There, the Seventh Circuit ordered arbitration despite the facts that the district court had found the contract "vague and ambiguous," and construed it against its drafter.[11] *See also Teledyne, Inc. v. Kone Corp.*, 892 F.2d 1404, 1410, (9th Cir. 1990).

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847 (9th Cir. 1985); *Schacht v. Beacon Ins. Co.* 742 F.2d 386 (7th Cir. 1984); *Sigety v. Axelrod*, 535 F.Supp. 1169, 1172 (S.D.N.Y.1982). In all these cases, the parties ultimately were ordered to arbitrate.

[11] The district court's decision here makes no mention of this basic rule of contract construction, because it adopted Standard's proposed Findings and Conclusions word for word. While this does not constitute reversible error, we do scrutinize such findings with extra care. *Hagans v. Andrus*, 651 F.2d 622, 626 (9th Cir.), *cert denied*, 454 U.S. 859, 102 S.Ct. 313, 70 L.Ed.2d 157 (1981).

Thus, in the absence of any evidence that Paragraph IV of the Memorandum was intended as non-severable, we must strictly enforce any agreement to arbitrate, regardless of where it is found. Under *Prima Paint* and *Teledyne*, we hold that the district court erred in considering the contract as a whole to determine the threshold question of whether Nicaragua may enforce the arbitration agreement contained in Paragraph IV.

Three Valleys Mun. Water District v. E.F. Hutton & Co., Inc., 925 F.2d 1136 (9th Cir.1991), is not to the contrary, as that case involved entirely different facts. There, no issue existed as to whether the Client Agreements which called for arbitration were valid contracts; instead, the plaintiffs argued that the Agreements were void because the signatory was without authority to bind his principals. As we hold below in response to SFC's similar argument, the issue of agency is essentially a legal one and must be decided by a court. See Part II below; *Three Valleys* at 1140-1142. However, where the parties admit to signing a document that contains an arbitration provision, as here and in *Teledyne*, all questions regarding breach of the agreement must be referred to arbitration.

B. ARBITRATION AGREEMENT AND SCOPE

The next question is whether Paragraph IV in fact constitutes an agreement to arbitrate, and whether it encompasses the dispute at hand. The district court stated that the parties had not made any present agreement to submit all disputes under the Memorandum to arbitration, but merely agreed to include such clauses in future contracts. It also made a second alternative statement that the scope of the clause was too narrow to encompass the breach of contract issue, citing *Mediterranean Enterprises, Inc. v. Ssangyong Corp.*, 708 F.2d 1458, 1462-63 (9th Cir.1983). It is unclear whether these statements were based on the language of the Memorandum itself, or on the evidence of the parties' intent developed during the evidentiary hear-

ing. In any case, since "the issue of arbitrability 'is to be determined by the contract entered into by the parties,' [t]he task before this court remains one of contractual interpretation." *Id* at 1463 (quoting *Drake Bakeries v. Local 50, Am. Bakery & Confectionery Wkrs. Int'l.*, 370 U.S. 254, 256, 82 S.Ct. 1346, 1348, 8 L.Ed.2d 474 (1962); accord, *A.T. & T. Technologies v. Comm. Workers of America*, 475 U.S. 643, 648-49, 106 S.Ct. 1415, 1418-19, 89 L.Ed.2d 648 (1986).

[4] However, because of the presumption of arbitrability established by the Supreme Court, courts must be careful not to overreach and decide the merits of an arbitrable claim. Our role is strictly limited to determining arbitrability and enforcing agreements to arbitrate, leaving the merits of the claim and any defenses to the arbitrator. *See Graphic Comm. Union, Dist. Council #2 v. GCIU-Employer Retirement Benefit Plan*, 917 F.2d 1184 (9th Cir.1990); *Camping Construction Co. v. D.C. Ironwkrs., Local U. #378*, 915 F.2d 1333 (9th Cir.1990); *Paulson v. Dean Witter Reynolds, Inc.*, 905 F.2d 1251 (9th Cir. 1990); *Teledyne, Inc. v.Kone Corp.*, 892 F.2d 1404, 1410 (9th Cir.1990); *Howard Elec. & Mech. v. Briscoe*, 754 F.2d 847, 850 (9th Cir.1985).[12]

[5] Here, the district court disregarded "the emphatic federal policy in favor of arbitral dispute resolution [which] applies with special force in the field of international commerce." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.*, 473 U.S. 614, 631, 105 S.Ct. 3346, 3356, 87 L.Ed.2d 444 (1985); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 94 S.Ct. 2449, 41 L.Ed.2d 270 (1974); *Bremen v.*

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[12] *See also Muh v. Newberger, Loeb & Co., Inc.* 540 F.2d 970, 972 (9th Cir. 1976) (If parties have agreed to arbitrate, "the entire controversy must be referred to the arbitrator, including the validity of the contract"); *Sauer-Getriebe KG v. White Hydraulics, Inc.*, 715 F.2d 348, 350 (7th Cir. 1983), *cert. denied*, 464 U.S. 1070, 104 S.Ct. 976, 79 L.Ed.2d 214 (1984) (arbitration agreements severable, even where defenses go to the validity of the contract itself).

Zapata Off-Shore Co., 407 U.S. 1, 15, 92 S.Ct. 1907, 1916, 32 L.Ed.2d 513 (1972); *Teledyne*, 892 F.2d at 1410. According to the Supreme Court, when international companies commit themselves to arbitrate a dispute, they are in effect attempting to guarantee a forum for any disputes. Such agreements merit great deference, since they operate as both choice-of-forum and choice-of-law provisions, and offer stability and predictability regardless of the vagaries of local law:

> "The elimination of all such uncertainties by agreeing in advance on a forum acceptable to both parties is an indispensable element in international trade, commerce, and contracting."
>
> An agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute.

Scherk v. Alberto-Culver Co., 417 U.S. at 518-519, 94 S.Ct. at 2456-2457 (citation omitted). *See also Mediterranean*, 708 F.2d at 1462-63.[13]

The district court also found that the clause's "lack of specificity" mitigated against its enforcement. However, the clear weight of authority holds that the most minimal indication of the parties' intent to arbitrate must be given full effect, especially in international disputes. *See, e.g. Bauhinia Corp. v. China Nat'l Machinery and Equip. Co.*, 819 F.2d 247 (9th Cir. 1987) (arbitration ordered where contract contained two incomplete and contradictory arbitration clauses); *Mediterranean*, 708 F.2d at 1462-63 (broadly construing scope of Korean arbitration clause un-

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[13] The fact that the United States has enacted the International Convention on the Recognition and Enforcement of Foreign Arbitral Awards as part of the Federal Arbitration Act, 9 U.S.C. §§ 201-208, is further evidenced of this federal policy. *See Mitsubishi*, 473 U.S. at 631, 105 S.Ct. at 3356.

der the Act).[14] Under this analysis, Paragraph IV here was not too vague to be given effect, especially when considered in light of Robert Moore's letter explaining the ambiguity.

The scope of the clause must also be interpreted liberally:

> as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.

Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp., 460 U.S. 1, 24-25, 103 S.Ct. 927, 941-942. *See also Three Valleys*, 925 F.2d at 1144; *French v. Merrill Lynch*, 784 F.2d 902, 908 (9th Cir. 1986) (if the "purported agreement . . . is susceptible of an interpretation" that would allow arbitration, "any doubts . . . should be resolved in favor of arbitration"); *Howard*, 754 F.2d at 850 (9th Cir. 1985) (same).

Mediterranean construed contract language very similar to the Memorandum at issue here. We stated that a clause reading "[a]ny disputes arising hereunder or following the formation of joint venture . . ." was synonymous with "arising under" (the Memorandum's term) and held that it encompassed a count alleging breach of the agreement itself—precisely the claim at issue here. 708 F.2d at 1461,

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[14] *See also Weyerhaeuser Co. v. Western Seas Shipping Co.*, 743 F.2d 635, 637 (9th Cir.), *cert. denied*, 469 U.S. 1061, 105 S.Ct. 544, 83 L.Ed.2d 431 (1984); *Washington Heights v. District 1199, Nat'l Union of Hosp. & Health Care Employees*, 748 F.2d 105 (2d Cir. 1984) (thoughtful discussion of *Prima Paint* issue).

1464.[15] Under *Mediterranean and Cone*, we hold that Paragraph IV's commitment to arbitrate "any and all disputes arising under the arrangements contemplated hereunder" is arguably susceptible of an interpretation that the parties agreed to arbitrate this claim. As we must resolve all doubts in favor of arbitration, we hold that this dispute must be referred to the arbitrators.

C. IRRELEVANT EVIDENCE AS TO INTENT

[6,7] Finally, the district court's analysis incorporated several evidentiary factors which are irrelevant as a matter of law to the question of arbitrability. These included the language of the Memorandum generally, which is as we have seen irrelevant under *Prima Paint*, and the identity of the signatories, which is relevant only to whether SFC is also bound. *See Bauhinia Corp. v. China Nat'l Machinery and Equip. Co.*, 819 F.2d 247 (9th Cir. 1987) (arbitration clauses enforceable even if ambiguous); *Howard Elec. & Mech. v. Briscoe Co.*, 754 F.2d 847, 850 (9th Cir. 1985) (absence of third party no defense to enforcement); *Weyerhaeuser Co. v. Western Seas Shipping Co.*, 743 F.2d 635, 637 (9th Cir.), *cert. denied*, 469 U.S. 1601, 105 S.Ct. 544, 83 L.Ed.2d 431 (1984) (same).

[8,9] The district court also found it significant that Nicaragua waited until 1987 to invoke its arbitration rights. However, as Nicaragua correctly points out, a delay in invoking remedies does not foreclose the remedy. Nicaragua would certainly have been within its rights to attempt to settle the dispute informally before proceeding to arbitration. Finally, the district court concluded that placing arbitration clauses in all subsequent contract drafts evidenced Nicaragua's understanding that the Memoran-

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[15] The district court cited *Mediterranean* for the proposition that "arising under" covers "a relatively narrow" range of disputes. It is true that we denied arbitration of three other counts in that case as outside the scope of the arbitration agreement. However, the claim of breach was sent to arbitration. *Id.* at 1464.

dum's clause was not binding. Nicaragua correctly maintains that the subsequent proposals by both sides merely carried out the commitment established by the Memorandum, and that a preliminary agreement may be binding under California law regardless of whether subsequent contracts are finalized. *See Hotel del Coronado Corp. v. Foodservice Equip. Assn.*, 783 F.2d 1323, 1325 (9th Cir. 1986); *Seaman's Direct Buying Service, Inc. v. Standard Oil Co.*, 36 Cal.3d 752, 686 P.2d 1158, 206 Cal. Rptr. 354 (1984).

In addition, as noted above, the district court failed to consider substantial amounts of documentary evidence presented by Nicaragua as to the intent and scope of the arbitration agreement, and failed to resolve ambiguities in favor of arbitration as required by *Cone* and its progeny. We hold that the language of the clause at issue here, read in light of the *Prima Paint* severability rule and the strong presumption of arbitrability in international disputes, requires that the arbitration clause be enforced against C & C and Steamship. Nicaragua's motion to compel arbitration is granted, and the case remanded to determine the appropriate arbitral agency.

II. *SUMMARY JUDGMENT*

[10] In reversing the district court's finding of nonarbitrability and remanding for arbitration, we must also reverse the district court's grant of summary judgment to defendants on the issues of whether the Memorandum is enforceable and has been breached. In so doing, we note that the district court relied improperly on credibility findings to support its grant of summary judgment on the parties' intent. *See Aronsen v. Crown Zellerbach*, 662 F.2d 584, 591 (9th Cir. 1982), *cert. denied*, 459 U.S. 1200, 103 S.Ct. 1183, 75 L.Ed.2d 431 (1983); *Pepper & Tanner, Inc. v. Shamrock Broadcasting, Inc.*, 563 F.2d 391, 393 (9th Cir. 1977). It also disregarded several factual conflicts between Nicaragua's documentary evidence and testimony presented at the arbitration hearing.

Because the arbitrators may apply their own rules of contract interpretation, we need not reach the district court's application of the California U.C.C. Statute of Frauds and the parol evidence rule, or its holding that a preliminary agreement cannot be a binding contract under California law. *See* Cal. Comm. Code § 2201-2204.

[**11-13**] On the issue of agency, we also reverse the grant of summary judgment and remand for further proceedings in the district court. This issue is properly before the court rather than before an arbitrator. *Three Valleys Mun. Water District v. E.F. Hutton & Co., Inc.*, 925 F.2d 1136 (9th Cir. 1991). It is true that the Memorandum of Intent itself did not expressly name Standard Fruit Company as a party, and was not signed expressly on behalf of SFC. However, the court's finding that Nicaragua presented no facts on which an inference of agency could be based was erroneous, since the record contains evidence tending to demonstrate both ostensible agency and ratification was presented.

Agency is a question of fact under California law. *See Barclay Kitchen, Inc. v. California Bank*, 208 Cal. App.2d 347, 353, 25 Cal. Rptr. 383 (1962); *Myers v. Stephens*, 233 Cal. App.2d 104, 43 Cal. Rptr. 420 (1965). In particular, ostensible or apparent agency "arises as a result of conduct of the principal which causes the third party reasonably to believe that the agent possesses the authority." *Tomerline v. Canadian Indem. Co.*, 61 Cal.2d 638, 643, 394 P.2d 571, 39 Cal. Rptr. 731 (1964). Furthermore, a party can be bound to an agreement by subsequent performance whether agency existed or not. *Feary v. Aaron Burglar Alarm, Inc.*, 32 Cal. App.3d 553, 559, 108 Cal. Rptr. 242 (2d Dist. 1973). The district court's grant of summary judgment to SFC on this issue was premature and failed to reconcile at least three pieces of conflicting evidence which tended to demonstrate that C & C and Steamship did act as agents of SFC.

First, all parties to the Memorandum treated the three companies as one entity during the contract negotiations.[16] Secondly, it was SFC itself who opened negotiations in Nicaragua after the revolution, and it continued actively negotiating a new contractual relationship until a month before the San Francisco meeting. Third, SFC General Manager James Sousane was allegedly employed by C & C and supervised by a Steamship officer, William Swinford, and testified that he did not know which company he had been representing in San Francisco. This evidence creates an inference of ostensible agency in Nicaragua's favor, and the district court erred in disregarding it.

Furthermore, the court erred in failing to address the issue of whether SFC ratified its parent companies' conduct, although Nicaragua presented at least two pieces of documentary evidence on this issue. The first was a letter from SFC General Manager Sousane to a Nicaraguan Minister, on SFC letterhead, which stated:

> Our Company will continue operating in Nicaragua and will extend to the state the technical assistance *as it has committed itself to doing in the San Francisco Memorandum of Intent* . . .

(Emphasis added.) Secondly, during its 22 months of operation in Nicaragua between the signing of the Memorandum and the final pull-out, SFC representatives transferred company assets to Nicaragua as provided in the Memorandum. It is not clear what their motive was for incurring this substantial loss if they did not consider themselves bound to do so. Finally, it is undisputed that SFC acted as though it were bound by the Memorandum for almost two years. Based on these facts, an inference

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[16] Factual disputes also exist as to the corporate affiliation of the four C & C and Steamship signatories: Nicaragua's documentation indicates that each was also an officer or director of SFC, which may assist in establishing an agency relationship.

is drawn in Nicaragua's favor that an agency relationship either existed during the negotiations or that SFC had subsequently ratified, and therefore is bound by, the Memorandum of Intent.

Therefore, summary judgment dismissing SFC on this alternative ground was also improper, and the question of agency is remanded for further consideration by the district court in light of this opinion. We emphasize that this issue is one which the district court itself must decide, unlike the contractual issues discussed above, since "the 'first principle' of arbitration [is] that 'a party cannot be required to submit [to arbitration] any dispute which he has not agreed so to submit.' " *Three Valleys Mun. Water District v. E.F. Hutton & Co. Inc.*, 925 F.2d 1136, 1142 (9th Cir. 1991), quoting *AT & T Technologies v. Comm. Workers of America*, 475 U.S. 643, 648, 106 S.Ct. 1415, 1418, 89 L.Ed.2d 648 (1986). Thus, unless ostensible agency or ratification is found on remand so as to bind SFC, only Steamship and C & C may be required to arbitrate the claim of breach.

CONCLUSION

The judgment is REVERSED and the case REMANDED for an order directing arbitration. The summary judgment granted in favor of defendants C & C and Steamship on Count II is REVERSED. The grant of summary judgment to SFC on the issue of agency is REVERSED AND REMANDED for further consideration by the district court in light of this opinion.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Case No.: C-86-6035 JPV

REPUBLIC OF NICARAGUA, a foreign sovereign,
Plaintiff,

v.

STANDARD FRUIT COMPANY, STANDARD FRUIT AND STEAMSHIP COMPANY, and CASTLE & COOKE, INC.,
Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The following findings of fact and conclusions of law are based upon the evidence presented at the hearing of June 29-July 1, 1987 and the exhibits and depositions filed with the Court in connection therewith.

I. FINDINGS OF FACT

A. Underlying Factual Findings.

1. Defendant Standard Fruit Company ("Standard Fruit") is incorporated in Delaware and has corporate offices in San Francisco, California. For tax reasons, defendant Standard Fruit conducts 95% of its business in the developing parts of the Western Hemisphere. Standard Fruit is a production company which enters into contracts with fruit growers and engages in agricultural development and other activities for the purposes of production and shipment of bananas and other fruit. Defendant-Standard Fruit is a wholly-owned subsidiary of Standard Fruit and Steamship Company ("Steamship").

2. Defendant Steamship is a wholly-owned subsidiary of defendant Castle & Cooke, Inc. ("C&C"). Steamship purchases fruit products from Standard Fruit but does not buy bananas from growers. Defendant Steamship distributes and transports fruit products in the United States.

3. Defendant C&C is not in the business of buying bananas or entering into fruit purchase contracts.

4. Starting in 1970, at the request of the Nicaraguan government, defendant Standard Fruit set up banana plantations in Western Nicaragua for the purpose of producing bananas and exporting them to the United States and other countries.

5. In order to carry out its banana exporting activities, Standard Fruit entered into several legal arrangements with landowners in the province of Chinandega, Nicaragua.

6. Standard Fruit entered into three sets of contracts with landowners participating in the banana programs. First, it concluded partnership agreements with each of the landowners pursuant to which the parties invested in limited liability production partnerships for the purpose of planting, cultivating, and selling bananas. The equity interests in the production partnerships were allocated such that the landowners held 80% while Standard Fruit held 20%. Second, it leased plantations from the landowners and assigned those leases to the partnerships. Third, each of the partnerships entered into a fruit purchase agreement with Standard Fruit pursuant to which it agreed to sell exclusively to Standard Fruit all export-quality bananas they produced.

7. On July 19, 1979, a revolutionary government assumed power in Nicaragua and thereafter created the five-member, executive-styled National Reconstruction Government Junta.

8. From late 1979 until December 1980, Standard Fruit and the new government discussed the future of the ba-

nana industry in Nicaragua in light of the new government's intent to assume greater control over the purchase and marketing of bananas. Nicaragua was informed as early as June 11, 1980 that any negotiations with Standard Fruit should be conducted with Mr. James Sousane, its General Manager, who had full negotiation authority. On June 23, 1980, at Mr. Sousane's request, Nicaragua's Minister of Foreign Trade, Mr. Alejandro Martinez Cuenca, sent Mr. Sousane a memorandum summarizing the government's proposed "basic guiding principles for the new contractual relationship between the Republic of Nicaragua and Standard Fruit Co."

9. While Standard Fruit was willing to work with the Nicaraguan government in developing a new structure, it communicated to Nicaragua that it could not accept all of the proposed guiding principles. Standard Fruit explained, *inter alia*, that a new structure involving the transfer to the government of its 20 percent interest in the banana production societies would be subject to the consent of Standard Fruit's partners in those societies.

10. Standard Fruit and Nicaragua exchanged views on these "basic guiding principles" until the Nicaraguan junta promulgated Decree No. 608 on December 20, 1980.

11. Decree No. 608 declared that the banana industry thenceforth would be operated solely by a state enterprise to be created in the future and that all land lease contracts by local banana plantation owners would be transferred to the new enterprise. The Decree declared all preexisting lease, partnership, and fruit purchase contracts nullified.

12. Standard Fruit construed Decree No. 608 as an expropriation of its banana business in Nicaragua and decided to cease operations in Nicaragua.

13. As a result, Mr. Sousane left Nicaragua in late December 1980; a small number of Standard Fruit employees also left the country, and Standard Fruit stopped pur-

chasing fruit. No Standard Fruit employees were terminated, nor were equipment or supplies removed from Nicaragua.

14. As a result of the effort of Mr. Arturo J. Cruz (a member of the junta), Mr. Don Kirchhoff, the President of C&C, agreed that high-level officials of C&C would meet with senior officials of the Nicaraguan government in San Francisco beginning on January 9, 1981, to discuss whether there was a basis for Standard Fruit to resume its operation of the Nicaraguan plantations.

15. Four days before the San Francisco meetings began, Standard Fruit's partners in the production societies wrote to Standard Fruit that "the marketing contracts are still in effect," urging Standard Fruit "to comply with their terms" and requesting to be represented in the upcoming meetings. Standard Fruit's partners did not, however, participate in those meetings.

16. From January 9-11, 1981, the following individuals among others convened at C&C's San Francisco headquarters: Mr. Leonard Marks, Jr., Executive Vice President and Chief Administrative Officer, C&C; Robert M. Moore, Esq., Senior Vice President and General Counsel, C&C; Mr. Robert W. Fisher, Executive Vice President, Steamship; Mr. William Swinford, Vice President, Steamship; Mr. David DeLorenzo, former General Manager of Standard Fruit's Nicaragua Division; Mr. Carlos Mata, legal advisor to the Nicaragua Division; Commander Jaime Wheelock Roman, Nicaragua's Minister of Agricultural Development and Agrarian Reform (possessing a law degree from the University of Chile); Mr. Alejandro Martinez Cuenca, Nicaragua's Minister of Foreign Trade; Mr. Arturo J. Cruz, member of Nicaragua's junta; Norton T. Tennille, Esq., a partner of Arnold & Porter, counsel to Nicaragua; Kay Stubbs, Esq., translator and member of the Ohio and District of Columbia Bars.

17. All witnesses concur that both sides were represented by "high-level" delegations.

18. Two of the three officials signing the Memorandum of Intent on behalf of Nicaragua, Mr. Cruz and Commander Wheelock, had not previously participated in discussions with Standard Fruit.

19. On January 11, 1981, Nicaragua, C&C, and Steamship executed a document entitled "Memorandum of Intent" ("Memorandum"). Messrs. Cruz, Martinez, and Wheelock signed on behalf of the republic of Nicaragua. Messrs. Marks and Moore signed on behalf of C&C. Messrs. Fisher and Swinford signed on behalf of Steamship.

20. Standard Fruit was not a signatory to the Memorandum of Intent. Senior officials of Standard Fruit were present at the time the Memorandum was negotiated but did not execute it on Standard Fruit's behalf. The document nowhere names Standard Fruit as a party and nowhere notes that any other signatory was signing as Standard Fruit's agent.

21. At the meeting in San Francisco, no one represented to the Nicaraguan delegation that any of the other signatories to the Memorandum were executing the document on behalf of Standard Fruit.

22. The contents of the Memorandum of Intent evolved after four or more drafts.

23. During the negotiations over the contents of the Memorandum of Intent, Nicaragua sought and effected several changes in its language. At Nicaragua's request, the preamble's language, "the parties hereby agree," was changed to read "the parties hereby agree in principle." At the request of Nicaragua, the direction that the fruit purchase contracts, which were to be prepared later, would "be on terms and conditions common to contracts of this sort," was deleted. At Nicaragua's request, the Memorandum's language providing that any disputes "arising under

the arrangement contemplated [t]hereunder" "will be referred to arbitration in London, England, according to the rules of the London Arbitration Association" was changed to provide for only "mutually agreed mechanisms or procedures such as the rules of the London Arbitration Association."

24. The Memorandum of Intent established the conceptual guidelines under which Standard Fruit would return to Nicaragua and start to negotiate commercial contracts with the Nicaraguan government. It was not itself one of those contracts.

25. The Memorandum of Intent contemplated that the following documents or contracts would subsequently be negotiated and executed: documents effectuating Nicaragua's purchase of Standard Fruit shares in the banana production societies "under mutually agreeable conditions"; documents effectuating Nicaragua's purchase of Standard Fruit's assets at a price to be determined; a fruit purchase contract; and a technical assistance contract.

26. The reference in the Memorandum to Nicaragua's purchase of Standard Fruit's shares in the production partnerships "under mutually agreeable conditions," pertains to the requirement, under Nicaraguan law, that the approval of the other partners be obtained before the shares could be transferred.

27. The Memorandum of Intent contemplated that *after* the preexisting contracts to which Standard Fruit was a party were resolved, Standard Fruit, a nonsignatory to the Memorandum, would *in the future* enter a contract with the "competent national entity" for the purchase of all bananas produced on the acreage in cultivation at the time of the "Programa Bananero del Occidente." The Memorandum contemplated that the contract would be for the term of five years (without specifying starting or ending dates) and would set forth a price of $4.30 per box F.0.B. Nicaraguan port of loading for first-quality fruit.

The price of other-quality fruit was to be negotiated later. The Memorandum also contemplated that the fruit purchase contract would provide or a set off of 50¢ per box for the amortization of loans and purchase of assets and 25¢ per box for Standard Fruit's provision of technical services, pursuant to a separate technical services contract.

28. The Memorandum stated that the execution of a fruit purchase contract was not an automatic event. Such a contract would be executed only "following the official resolution without claim or damage of preexisting contracts which might be thought to conflict therewith" and after or together with the completion of a technical assistance contract.

29. The signatories of the Memorandum understood that "preexisting contracts" referred at least in part to Standard Fruit's contracts with its Nicaraguan partners and the partnerships which would conflict with any contract by which Standard Fruit would purchase fruit from anyone else, such as the "competent national entity."

30. Paragraph VII of the Memorandum contemplated that Standard Fruit would provide and be compensated for technical assistance pursuant to a separate technical assistance contract to be negotiated in Nicaragua. No such technical assistance contract had ever been signed, nor was Standard Fruit willing to conclude such a contract without simultaneously obtaining a fruit purchase commitment.

31. Paragraph IV of the Memorandum of Intent states: "Any and all disputes arising under the arrangements contemplated hereunder, should same not be able to be settled amicably settled [*sic*] by the parties, will be referred to mutually agreed mechanism or procedures of international arbitration, such as the rules of the London Arbitration Association." The phrase "arrangements contemplated hereunder" referred to the legal documents subsequently to be negotiated, executed, and performed in Nicaragua. The parties intended that all subsequent contracts called

for by the Memorandum would have arbitration clauses, pursuant to Paragraph IV.

32. The following are some examples among many of language in the Memorandum of Intent which reveals both the tentative nature of the document and the parties' assumption that contractual relationships would result only at a later time and upon the occurrence of certain specified events.

a. The document is titled "Memorandum of Intent."

b. Its preamble states that the parties have agreed only "in principle."

c. In Article VII, entitled "Basic Operational Aspects of Production," the Memorandum states that the Government of *Nicaragua* and *Standard Fruit* "*shall enter a contract* (following the official resolution without claim or damage of preexisting contracts which may be thought to conflict therewith) . . . *for the purchase of all bananas* . . ." [Emphasis supplied.] That provision further states that the fruit purchase contract "shall be" entered into with a competent national entity, which "shall" in turn contract with the production societies.

d. In Article VIII, the Memorandum states:

> The parties agree that in accordance with the spirit of compatibility and cooperation evidenced during the *negotiations hereinabove memorialized*, the Government of Nicaragua and *Standard Fruit will take* all such further actions and execute and deliver all such applications, decrees, documents and/or other papers *as are necessary* to the full accomplishment of the *aims expressed* herein. (Emphasis supplied.)

33. About a week after January 11, 1981, Mr. Sousane returned to Nicaragua and operated on the assumption that the fruit purchase contracts and the technical assist-

ance contract would eventually be concluded. A few employees were brought back into the country. No employees had been terminated, so none needed to be rehired.

34. About a week after January 11, 1981, Standard Fruit returned to Nicaragua, started negotiating the fruit purchase and technical assistance contracts, and began working with Nicaragua to achieve the transfer of Standard Fruit's partnership shares. In the meantime, Standard Fruit bought all first-quality bananas at $4.30 per box, provided technical assistance in connection with the growing of bananas, and deducted 50¢ per box for amortization of debt and 25¢ per box for the technical assistance. In those respects, Standard Fruit operated "as though" the contracts whose negotiation was beginning were already in force.

35. Standard Fruit's conduct pending execution of implementing contracts was based not on its understanding that the Memorandum was a contract requiring it to return to Nicaragua immediately, but on a good faith desire to further the interest of all parties involved.

36. Standard Fruit's 1981-82 internal budget report stated that " 'the good faith' document signed in San Francisco presumably will allow us to operate effectively here for at least another two years."

37. A telex from Nicaragua's Washington lawyer, William Rogers, Esquire, a few days after the execution of the Memorandum of Intent, reveals the following contemporaneous (and clearly correct) interpretation of the Memorandum:

> The Memorandum of Intent contemplates that Standard Fruit will resume its traditional position in the Nicaraguan Industry, and that Nicaragua and Standard Fruit will sign a new contract, after preexisting contracts are resolved. . . . That new contract has not yet been signed.

38. After January 11, 1981, certain of C&C's public statements, such as press releases, annual reports, and SEC filings, refer to the document signed on January 11, 1981 as a "final agreement." This terminology is consistent with the view of C&C and Steamship signatories that the Memorandum of Intent effected a final resolution of the "basic principles" which were to govern new contractual relationships.

39. C&C's form 10-K for the period ending June 20, 1981 stated that C&C and Nicaragua have entered into a "general agreement that *should* ensure a continuation of normal business operations in Nicaragua." (Emphasis supplied.) The form states that the general agreement

> will be implemented through a five-year purchase contract for purchase of banana production by the Company and purchase of the Company's assets by the Government of National Reconstruction of the Republic of Nicaragua. Another contract contemplated in the general agreement provides for a continuation of technical assistance. Both this latter contract and the purchase contract are being finalized.

40. After January 11, 1981 and until October 25, 1982, Standard Fruit and Nicaraguan officials engaged in negotiations regarding the contracts contemplated in the Memorandum of Intent. During the period, draft contracts were frequently exchanged.

41. Standard Fruit first presented a draft agreement reiterating most of the conditions contemplated in the Memorandum of Intent.

42. Nicaragua responded with four draft contracts: a draft fruit purchase agreement, a draft technical assistance agreement, a draft contract for purchase and sale of Standard Fruit's assets and Nicaragua's assumption of the

partnerships' debts, and a general draft contract between the Government of Nicaragua.

43. Like Standard Fruit's initial draft, Nicaragua's general draft contract contained provisions reiterating or similar to many of the general agreements in principle established in the Memorandum of Intent. This suggests that neither party felt it was already contractually bound to those provisions.

44. All of the fruit purchase and technical assistance contract drafts exchanged during the entire period of negotiations contained arbitration clauses. These clauses differ markedly from the language in Article IV of the Memorandum of Intent. For example, the early drafts of the technical assistance contract, the fruit purchase contract, and the general agreement specified the scope of the arbitration clause as covering "any disputes arising out of the *interpretation and enforcement of this Agreement and out of the legal instruments implementing it.*" A later draft fruit purchase contract defined the arbitration clause's scope to cover "any dispute, difference of opinion or claim which may arise out of or be related to *this Contract, its interpretation or its nonfulfillment, termination or invalidity . . .*"

45. One arbitration clause proposed by Nicaragua provides for submission of the dispute to a referee or arbitration in accordance with the rules of the Inter-American Commercial Arbitration Commission.

46. In the first draft contracts, Nicaragua's proposals frequently departed from the terms discussed in the Memorandum of Intent that Nicaragua now argues were binding in all respects. For example, Nicaragua's draft fruit purchase agreement included a provision under which the five-year term could be shortened if the debt owed to Standard Fruit was fully amortized in a shorter time. Instead of providing for a 25¢ per box deduction for technical assistance, the Nicaraguan technical assistance contract

draft proposed an annual cap of $1.5 million. Instead of providing for deductions on all bananas purchased by Standard Fruit, Nicaragua proposed that the deductions be allowed only for first-quality bananas, although Nicaragua took the position (contrary to what its witnesses testified) that Standard Fruit was obligated to purchase second-quality fruit as well.

47. In a later proposal, Nicaragua attempted to reserve the option to sell bananas on a C.I.F. basis, even though the Memorandum of Intent specified that the price in the fruit purchase contract would be F.0.B.

48. The last complete fruit purchase contract draft prepared eights months after the Memorandum reveals unresolved disputes over the price of second-quality fruit, compensation for fruit not packed, premiums for first-quality fruit, failure to obtain 90% of the required minimum number of boxes of bananas, and many other terms.

49. At the time the Memorandum was signed, no entity of the Nicaraguan government held title to any bananas. Nicaragua had not acquired bananas to sell from the parties who owned them.

50. Nicaragua did not at any relevant time enter into a contract with the production societies to purchase their bananas for resale to defendants.

51. Standard Fruit and Nicaragua never signed a technical assistance contract, nor did they execute documents establishing the government's assumption of the partnership debt.

52. Despite the efforts of Nicaragua and Standard Fruit, the consent required of all of the partners to authorize Standard Fruit's transfer of its shares to Nicaragua was never obtained.

53. No evidence was presented to suggest that Standard Fruit's preexisting lease and fruit purchase contracts with

its partners and with the production societies ever were officially resolved.

54. On October 25, 1982, when Standard Fruit ceased its banana growing and purchasing activities in Nicaragua, Standard Fruit and Nicaragua had neither finalized nor signed the fruit purchase contract they had been negotiating.

55. The issues now before this Court arose in or before October 1982, when Standard Fruit left Nicaragua. From October 1982 until November 3, 1986, Nicaragua made no written demand for defendants to submit to arbitration. When Nicaragua finally sought a forum to resolve its dispute, it selected this Court and filed a Complaint on October 25, 1986, which neither requested nor even mentioned arbitration. Even after amending its Complaint to preserve an option to arbitrate, Nicaragua did not commit to that option until December 31, 1986 when defendants moved to dismiss the bulk of its claims and filed substantial counterclaims.

B. Conclusion from the Facutal Findings

(i) Is the Memorandum of Intent a Contract?

56. As the trier of fact, the Court finds that plaintiff has failed to show by a preponderance of the evidence that the Memorandum of Intent was a contract.

57. On balance, the testimony of defendants' witnesses that he Memorandum was not intended as a binding contract is credible and consistent with the document's language, the surrounding circumstances, and the parties' contemporaneous conduct. The court finds the testimony of plaintiff's witnesses that the Memorandum was intended as a contract to be less credible and consistent.

58. The history of negotiations prior to January 11, 1981 suggests that the parties were discussing only "basic prin-

ciples" and were not making contractual commitments. Further, the evidence shows the clear understanding of the negotiators present at the San Francisco meetings that final contracts would be concluded in the future by Standard Fruit, a nonsignatory to the Memorandum of Intent, after, *inter alia*, the resolution of existing contracts with third parties and the consent of third parties to critical elements of the proposed new structure.

59. There is no evidence that contracts for the sale and purchase of bananas or other fruit products has ever been negotiated by the highest level government officials of any nation and the most senior officers of a corporation or a parent corporation. As a plaintiff witness testified, if the parties were ". . . negotiating a commercial contract . . ." there was no need to have members of the junta, two ministers, to sign the Memorandum of Intent. This, in and of itself, supports the contention that the Memorandum of Intent was not a contract for the sale and purchase of bananas but rather was an agreement to agree.

60. Of great significance is the fact that officers of Standard Fruit were present and participated in the meeting of January 9-11, 1981 but did not sign the Memorandum of Intent. Thus, the company that had been the purchaser of bananas and would be transferring its shares, selling its assets, providing technical assistance, and buying and selling bananas under the contemplated new structure, was not a signatory. This can only lead to the conclusion that the Memorandum of Intent was not a purchase agreement or a contract to purchase but was a statement of "political willingness to have Standard Fruit come back to Nicaragua" and a statement which would lay the broad ground rules for the anticipated contract between the Republic of Nicaragua and the eventual purchaser of bananas.

61. The Memorandum of Intent is replete with language indicating its preliminary nature. It significantly lacks lan-

guage acknowledging contractual status, which supports the conclusion that the Memorandum is not a binding contract. In several instances, language in the drafts of the Memorandum of Intent was softened at Nicaragua's request. These changes suggest that no contractual commitments were being made.

62. A general draft contract submitted by Nicaragua after January 11, 1981, incorporating the provisions of the Memorandum of Intent, presumably to be signed by Standard Fruit and a competent national entity, evidences Nicaragua's contemporaneous perception that the Memorandum of Intent itself was not a binding contract.

63. Based on all of the foregoing, the Court finds that the Memorandum reflected a mere agreement to agree. The Memorandum of Intent was not a contract under which disputes must be submitted to arbitration.

(ii) Does Paragraph IV of the Memorandum Evidence an Agreement to Arbitrate?

64. Although the Court's finding that the Memorandum was not a contract renders the remaining issues regarding arbitration moot, the Court will address the second issue of whether Paragraph IV of the Memorandum of Intent evidenced a present agreement to arbitrate certain disputes. The Court finds that it did not.

65. The language of the Memorandum itself, contemplating future arrangements which required the active participation of nonsignatories, the identity of those who signed the documents, and the lack of specificity in the arbitration clause itself, compel the Court's conclusion that the Memorandum of Intent does not contain a present agreement among the signatories to submit to arbitration, but rather contains a provision declaring the expectations of the parties that contracts to be negotiated later would include agreements to arbitrate. This interpretation is am-

ply supported by the clause's principal draftsman, Robert M. Moore, and by his counterpart, Norton Tennille.

66. The fact that *all* drafts of the fruit purchase and technical assistance contracts presented by *both* parties after January 11, 1981 included arbitration clauses also supports the view that the language in Paragraph IV of the Memorandum reflected the parties' intent that all contracts negotiated pursuant to the Memorandum would contain arbitration clauses. Had Nicaragua intended Paragraph IV of the Memorandum to be binding, there would have been no need to include arbitration clauses in its drafts of the fruit sales or technical assistance contracts.

67. Finally, Nicaragua's failure to demand arbitration from October 1982 through the time the Complaint was filed evidences Nicaragua's understanding that no agreement to arbitrate had been concluded.

C. Do the Disputes Before the Court Fall Within the Scope of Any Agreement to Arbitrate?

68. Even if the parties entered a valid agreement to arbitrate, plaintiff has failed to show by a preponderance of the evidence that the interpretation or enforcement of the Memorandum of Intent is within the scope of that agreement.

69. The Court finds Mr. Moore's testimony that the word "arrangements" in Paragraph IV meant the contracts contemplated in the Memorandum to be credible and authoritative. Therefore, the phrase in Paragraph IV of the Memorandum, "disputes arising under the arrangements contemplated hereunder," could at best encompass only disputes relating to the interpretation or performance of any contracts to be made by the parties which were "contemplated" in the Memorandum of Intent, such as the contracts for fruit sales, technical assistance, asset sales, and sales of partnership interests. Those final contracts contemplated were never concluded. Therefore, no dis-

putes, including the disputes before this Court, can have arisen under them.

II. CONCLUSIONS OF LAW

A. Plaintiff's Motion to Compel Arbitration

1. This hearing was held pursuant to the United States Arbitration Act, 9 U.S.C. § 4, which provides that when the making of an agreement to arbitrate is in dispute, the Court shall proceed summarily to the trial of that issue.

2. In order for Nicaragua to prevail on its motion to compel arbitration, it must demonstrate three things: first, that Nicaragua and defendants entered into a contract; second, that the contract included an agreement to arbitrate disputes; and third, that the disputes covered by the arbitration agreement included those which are before the Court. 9 U.S.C. § 1 *et seq* .; *Pollux Marine Agencies, Inc., v. Louis Dreyfus Corp.* 455 F. Supp. 211 (S.D.N.Y. 1978); *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 651, 106 S. Ct. 1415, 1420 (1986); *French v. Merrill Lynch, Pierce, Fenner & Smith Co., Inc.*, 784 F.2d 902, 908 (9th Cir. 1986).

3. The first issue before the Court is whether the Memorandum of Intent is a contract. Since the arbitrator can derive his power only from a contract when a party challenges its existence, the Court must decide whether there is a contract between the parties. *Sigety v. Axelrod*, 535 F. Supp. 1169, 1172 (S.D.N.Y. 1982); *Schacht v. Beacon Ins. Co.*, 742 F.2d 386, 389-90 (1984).

4. A mere "agreement to agree" is not a contract and has no legal force. *Alaimo v. Tsunoda*, 215 Cal. 2d 94, 97; 29 Cal Rptr. 806, 807 (lst Div. 1963). *Carter v. Milestone*, 170 Cal. App. 2d 189; 338 P.2d 569, 571 (2d Dist. 1959).

5. If a contract exists, it is the Court's responsibility to interpret it to the extent of determining whether the

parties intended to arbitrate any disputes regarding it. *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 651, 106 S. Ct. 1415, 1420 (1986); *Howard Electric v. Frank*, 754 F.2d 847, 850 (9th Cir. 1985).

6. The arbitration provisions of a purported agreement must be interpreted in their context rather than alone. *Georgia Power Co. v. Cimarron Coal Corp.*, 526 F.2d 101, 106 (6th Cir. 1975), *cert. denied*, 425 U.S. 952 (1976).

7. Even if the parties agreed to arbitrate *some* disputes, the Court cannot compel the parties to arbitrate issues not within the scope of an arbitration agreement. *French v. Merril Lynch, Pierce, Fenner & Smith Co., Inc.*, 784 F.2d 902, 908 (9th Cir. 1986); *Weyerhauser Co. v. Western Seas Shipping Co.*, 568 F. Supp. 1220, 1222 (N.D. Cal. 1983), *aff'd*, 743 F.2d 635 (9th Cir.), *cert. denied*, 469 U.S. 1061 (1984).

8. The words "arising under" when used in an arbitration provision are generally construed as intended to cover a narrow scope of disputes. *Mediterranean Enterprises, Inc. v. Ssangyong Corp.*, v. 708 F.2d 1458, 1464 (9th Cir. 1983). The Court has found as a matter of fact that the parties agreed only that subsequent contracts would contain arbitration clauses and did not in the Memorandum agree to arbitrate questions of its interpretation.

9. Because this Court has found as a factual matter that the Memorandum of Intent is not a contract, plaintiff's motion to compel arbitration must be denied. Alternatively, plaintiff's motion must be denied because the Court has found as a matter of fact that the parties did not enter into a present agreement to arbitrate; and/or that the parties did not agree to arbitrate the type of disputes presently before this Court.

10. Count I of plaintiff's Amended Complaint must be dismissed by virtue of plaintiff's failure to establish by a

preponderance of the evidence that the disputes before the Court must be arbitrated.

B. Standard Fruit's Motion for Summary Judgment

11. In order for-defendant Standard Fruit Company to prevail on its motion for summary judgment, it must demonstrate that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. Fed. R. Civ. P. 56.

12. Because the Memorandum of Intent does not expressly make Standard Fruit Company a party and nobody signed expressly on behalf of Standard Fruit, a *prima facie* case has been made that Standard Fruit is not bound thereby whatever the legal force of the Memorandum. A corporate subsidiary is not bound by the mere fact that its parent has executed a document. *Interocean Shipping Co. v. National Shipping and Trading Corp.*, 523 F.2d 527, 539 (2d Cir. 1975), *cert. denied*, 423 U.S. 1054 (1976).

13. The law does not presume an agency relationship. It is plaintiff's burden to establish facts sufficient to establish a dispute whether the officials signing the Memorandum of Intent were acting as Standard Fruit's agents or that some action by Standard Fruit reasonably led Nicaragua to believe they were so acting. *Myers v. Stephens*, 233 Cal. App. 2d 104, 43 Cal. Rptr. 420 (1st Dist. 1965); *Barclay Kitchen, Inc. v. California Bank*, 208 Cal. App. 2d 347, 25 Cal Rptr. 383 (2d Dist. 1962); *Keepelman v. Heikes*, 111 Cal. App. 2d 475, 245 P.2d 54 (1952).

14. Nicaragua has presented no facts on which an inference of actual or ostensible agency could be based. Standard Fruit therefore is not a party to the Memorandum, is not bound by it, and is entitled to judgment as a matter of law.

C. The Remaining Defendants' Motion for Summary Judgment

15. In order to prevail on their motion for summary judgment, the remaining defendants must establish that

no issue remains as to any material fact relating to Count II and that they are entitled to judgment as a matter of law. Fed. R. Civ. P. 56.

16. The transaction alleged by Nicaragua is a transaction in goods, Cal. Com. Code § 2102, evidenced by a document signed in California. The transaction thus bears "an appropriate relationship to this state" within the meaning of Cal. Com. Code § 1105, Cal. Code Comment ¶ 3 (West's 1964 and 1986 Supp.) and the California Commercial Code governs this dispute.

17. Writings which look toward some future contract but which do not evidence an existing contractual relationship do not satisfy the U.C.C. Statute of Frauds, Cal. Com. Code § 2201. *Conaway v. 20th Century Corp.*, 29 U.S.C. Rep. 1387, 1392-93 (Pa.1980); *Dataserve Equipment, Inc. v. Technology Finance Leasing Corp.*, 364 N.W. 2d 838 (Minn. App. 1985)

18. The plain meaning of Article VII of the Memorandum of Intent is that a five-year fruit purchase contract was to be concluded between Standard Fruit and a competent Nicaraguan national entity at a later time after the occurrence of certain specified events, including the official resolution of preexisting contracts with the growers and production societies. The Memorandum repeatedly states that Standard Fruit and the competent national entity "shall" enter into a contract and the purchase price "will be" $4.30 per box of first-quality bananas. Moreover, there are a significant number of matters relating to the purchase and sale of bananas reserved both explicitly and implicitly in the Memorandum of Intent for subsequent negotiation. The express terms of the Memorandum of Intent thus show that a purchase-sales contract would result only at a later time and after the occurrence of certain specified events and therefore does not establish that a "contract for sale has been made" pursuant to Cal. Comm. Code § 2201(1). *See also* Cal. Com. Code § 2204.

19. Plaintiff has taken the position that the Memorandum of Intent represents a binding contract. In light of that position, the parol evidence rule would prevent the introduction of testimony of a contemporaneous oral agreement which contradicts the express language of the document. Cal. Com. Code § 2202; *Enrico Farms, Inc. v. H. J. Heinz*, 629 F.2d 1304, 1306 (9th Cir. 1980); *Schwartz v. Shapiro*, 229 Cal. App. 2d 238, 40 Cal. Rptr. 189 (1st Dist. 1964).

20. The testimony of plaintiff's witnesses that on January 11, 1981, they believed that they were signing a contract which contained immediately effective, unconditional obligations to purchase and sell fruit for a five-year period contradicts the unambiguous language of the Memorandum of Intent. Such testimony, therefore, may not serve to create a genuine issue of material fact within the meaning of Fed. R. Civ. P. 56. Cal. Com. Code § 2202.

21. Because the Memorandum of Intent itself is not a final five-year fruit purchase contract, a five-year commitment to buy and sell bananas cannot be established by defendant's alleged 22-month course of conduct. Even if the parties bought and sold bananas for 22 months on terms consistent with the Memorandum of Intent, as a matter of law this can only establish a contract covering that time in which performance was rendered. Cal. Com. Code § 2201(3)(c).

22. There remains no genuine issue as to any material fact bearing on whether the Memorandum of Intent is a five-year contract for the purchase and sale of bananas as alleged in Count II of the Amended Complaint. Yet it is only such a five-year contract that defendants stand accused of having breached.

23. Defendants have therefore established that they are entitled to judgment on Count II as a matter of law.

DATED: April 13, 1988

/s/J.P. VUKASIN, JR.
J.P. VUKASIN, JR., JUDGE
UNITED STATES DISTRICT COURT

MEMORANDUM OF INTENT

This Memorandum of Intent entered into this 11th day of January, 1981, by and between the Government of National Reconstruction of the Republic of Nicaragua ("Government of Nicaragua") and Standard Fruit and Steamship Company and its parent company, Castle and Cooke, Inc. (both of which are collectively referred to as "Standard Fruit"), confirms the understanding reached by the parties concerning the continued participation by Standard Fruit in the banana industry of Nicaragua.

WHEREAS, the aforementioned parties recognize the need to establish and maintain a social, political, and economic environment conducive to the viability and long-term stability of the banana program in Nicaragua; and

WHEREAS, the Government of Nicaragua is dedicated to solving the serious and urgent social problems affecting the labor force participating in this important agricultural activity while providing an economically viable and realistic framework for the Nicaraguan banana program; and

WHEREAS, the Government of Nicaragua considers that the main objectives of the decree adopted on December 21, 1980 concerning the banana program can be achieved, and the spirit of that decree fostered, by the arrangements described below, to the mutual benefit and satisfaction of the parties and of the Nicaraguan laborers and producers;

NOW, the undersigned after full and frank discussion and negotiation and reflecting mutual confidence in their future relationship, have agreed in principle that Standard Fruit will continue in the banana business in Nicaragua based upon the undertakings, and subject to the terms and conditions, set forth below:

I. *Participation in Equity*:

The Government of Nicaragua agrees to purchase Standard's shares in the production societies under mutually agreeable conditions.

II. *Acquisition of Assets and Debt Repayment Schedule*:

The Government of Nicaragua recognizes, confirms and assumes responsibility for and the repayment of the advances and receivables due Standard Fruit, as shown on Standard Fruit's books, and will purchase the assets of Standard Fruit, as described on the annexed exhibit, which shall, however, be subject to audit and evaluation according to generally accepted accounting and evaluation principles and shall be amended as to amount to reflect conditions as of the date hereof. Such advances and receivables shall be paid and assets be purchased with funds generated by the set off against purchase price described in Section VII.

III. *Working Environment*:

The Government of Nicaragua agrees to cooperate in the establishment of an appropriate working environment for Standard Fruit, particularly in reference to:

a) The solution of labor controversies within the framework of Nicaragua's labor legislation.

b) The fostering of objective appraisals of the company's operations, by official agencies dealing with the media.

c) The assurance of safe passage (for legitimate business purposes) in and out of Nicaragua and Nicaraguan ports, of Standard Fruit's employees, vehicles and vessels, and the quiet enjoyment by Standard Fruit of a normal business presence.

IV. *Arbitration*:

Any and all disputes arising under the arrangements contemplated hereunder, should same not be able to be settled amicably settled by the parties, will be referred to mutually agreed mechanisms or procedures of international arbitration, such as the rules of the London Arbitration Association.

V. *Insurance of Investment*:

Standard Fruit makes note of the fact that it has in effect a policy of insurance from OPIC covering a portion of its investment in Nicaragua. Standard Fruit enters into this agreement with the understanding that such action will not adversely affect its current confirmation thereof. The Government of Nicaragua shall cooperate with Standard Fruit and use its best efforts to assist Standard Fruit in the latter's efforts to obtain additional insurance (from OPIC or such other governmental agency as is mutually agreed upon).

VI. *Treatment of Claims*:

The Government of Nicaragua shall refrain from adopting actions that may result in claims against Standard Fruit arising from the situation that has prevailed in the Nicaragua banana industry since December 21, 1980.

VII. *Basic Operational Aspects of Production*:

a) *Contractual Obligations*:

The Government of Nicaragua and Standard Fruit shall enter a contract (following the official resolution without claim or damage of pre-existing contracts which might be thought to conflict therewith) for the purchase of all bananas produced on the acreage presently under

cultivation in the so called "Programa Bananero de Occidente". Such contract shall be for a term of five years, shall be entered into with the competent national entity, which shall in turn contract with the societies.

b) *Prices*:

The purchase price agreed by both parties will be U.S. $4.30 per box F.O.B. Nicaraguan port of loading for the purchase of first quality fruit, the price of other quality fruit to be negotiated. Nicaragua agrees to provide for an offset and set off against such price of the sum of U.S. $.50 per box for amortization of loans and purchase of assets and U.S. $.25 per box for technical services to be provided by Standard Fruit (as per contract previously negotiated between the parties).

The contract shall contain a provision empowering either party to request renegotiation of the price to be paid if, at any anniversary date thereof the aggregate of the prices paid for a to be specified list of critical materials shall have increased by more than 10% over that existing at the date hereof, such base level to be automatically raised after each reopening.

c) *Supervision*:

The Government of Nicaragua agrees to provide for supervision by Standard Fruit of packing plant practices enunciated by Standard Fruit and for the carrying out of agricultural practices recommended by Standard Fruit pursuant to the technical services agreement referred to herein.

d) *Maintenance of Pre-existing Arrangements*:

The integrity of the relationships concerning the farms, the production societies and the owners and participants thereof is hereby confirmed by the Government of Nicaragua and the relationships there among will be maintained in existence as at present with the production societies leasing the land, producing bananas and entering new sale and technical assistance agreements, all with the result that the decree of December 21, 1980 shall be officially considered as having no effect during a period that shall not exceed five years.

e) *Financing*:

The Government of Nicaragua agrees to provide such advances for improvements, working capital and capital requirements as are needed by the production societies for their adequate operations.

f) *Tax Treatment*:

The Government of Nicaragua agrees that matters of tax computation and responsibility shall be governed by the spirit of the Tax Decree No. 74 enacted in 1970.

VIII. *Execution and Delivery*:

The parties agree that, in accordance with the spirit of compatibility and cooperation evidenced during the negotiations hereinabove memorialized, the Government of Nicaragua and Standard Fruit will take all such further actions and execute and deliver all such applications, decrees, documents and/or other papers as are necessary to the full accomplishment of the aims expressed herein.
Thus done and signed, this 11th day of January, 1981.

Thus done and signed, this 11th day of January, 1981.

REPUBLIC OF NICARAGUA

by /signature/
A.J. Cruz
Member of Junta de Gobierno

by /signature/
Cmdt. J. Wheelock
Minister of Agricultural Development

by /signature/
A. Martinez
Minister of Foreign Trade

CASTLE & COOKE, INC.

by /signature/
L. Marks Jr.
Executive Vice President

by /signature/
Robert M. Moore
Vice President and General Counsel

STANDARD FRUIT AND STEAMSHIP COMPANY

by /signature/
Robert W. Fisher
Executive Vice President

by /signature/
William Swinford
Vice President